SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY, PETITIONER,

vs.

HARRY M. DURNING, COLLECTOR OF CUSTOMS AT THE PORT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1934.

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[fols. a & 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CENTRAL VERMONT TRANSPORTATION COMPANY, Plaintiff-Appellee,

against

HARRY M. DURNING, Collector of Customs at the Port of New York, Defendant-Appellant

STATEMENT UNDER RULE 13

The above action was commenced on May 17, 1933, by the issuance of an order to show cause, signed by the Honorable Alfred C. Coxe, United States District Judge. The said order to show cause, together with the subpœna and bill of complaint, were served upon the defendant on May 18, 1933. The defendant thereafter moved to dismiss the bill of complaint for failure to state a cause of action and for want of equity. Argument was had before Honorable Frank J. Coleman, United States District Judge, on June 27, 1933. An order was entered pursuant to the opinion of the Court, on July 28, 1933, granting a preliminary injunction and denying the defendant's motion to dismiss. On August 8, 1933 this appeal was taken.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SUBPŒNA

The President of the United States to Harry M. Durning, Collector of Customs of the Port of New, York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a Bill of Complaint exhibited against you in the said Court in Equity, by Central Vermont Transportation

Company and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you of Two hundred and fifty ($250) Dollars.

Witness, Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, on the 15th day of May, in the year One thousand nine hundred and thirty-three and of the Independence of the United States the One hundred and fifty-seventh.

Charles Weiser, Clerk. (Seal.) Wallace R. Foster, Solicitor, 140 Nassau Street, N. Y. C.

The defendant is required to file his answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof, excluding the day of said service, otherwise the bill aforesaid may be taken Pro Confesso.

Charles Weiser, Clerk. (Seal.)

[fol. 3] In United States District Court for the Southern District of New York

In Equity

No. —

Central Vermont Transportation Company, Plaintiff,

against

Harry M. Durning, Collector of Customs of the Port of New York, Defendant

Bill of Complaint

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

The above-named plaintiff for its bill of complaint against the above-named defendant states:

I. That during all the times hereinafter mentioned, the plaintiff, Central Vermont Transportation Company, was

and still is a corporation duly organized and existing under and by virtue of the Laws of the State of Maine, with its principal office located at Portland in said State, and was and still is a common carrier of freight for hire, and was and still is a Citizen of said State of Maine, and its President and Managing Directors are citizens of the United States.

[fol. 4] II. That the defendant is the Collector of Customs of the Port of New York.

III. That this suit arises under the Constitution and Laws of the United States.

IV. That since the organization of the plaintiff in 1906 and continuously thereafter, all of the stock of said Central Vermont Transportation Company (except qualifying directors' shares) has been and still is owned by Central Vermont Railway, Inc., or its predecessor, Central Vermont Railway Company, both of which were corporations duly organized under the Laws of the State of Vermont; that from 1909 continuously to this date, substantially all the stock of Central Vermont Railway, Inc., or its predecessor, Central Vermont Railway Company, has been and still is owned by Canadian National Railway Company or its predecessor, Grand Trunk Railway Company of Canada.

V. That in 1909, plaintiff acquired and ever since has owned two certain steamships, the "New London" and the "New York" which were built in the United States and were then and still are duly enrolled and documented under the Laws of the United States, with Portland, Maine, as their home port; that said steamships have ever since been and now are operated by plaintiff exclusively as common carriers of freight between New London, Connecticut, and New York, New York, in conjunction with the Central Vermont Railway Route.

[fol. 5] VI. That said steamships are constructed for operation on Long Island Sound and are only suitable for such waters; that said steamships were designed particularly for the carriage of freight in connection with a railroad operation.

VII. That ever since 1909, the plaintiff and Central Vermont Railway, Inc., or its predecessor, Central Vermont

Railway Company, as common carriers, have been and still are engaged in the transportation of property partly by railroad and partly by water under a common control, management and arrangement for a continuous carriage or shipment between New York City and points in the States of Connecticut, Massachusetts and Vermont, by rail and by water; and by common arrangement between themselves and the Canadian National Railway Company or its predecessor, Grand Trunk Railway Company of Canada, have constituted and still constitute a through route over which property is transported between New York City and New England points in the East, and Chicago and other points in the West in Westward and Eastward movement, that said plaintiff and said Central Vermont Railway, Inc., and also the property transported by them have been and still are under the jurisdiction of the Interstate Commerce Commission and subject to the determination and control by said Commission of the terms and conditions under which said plaintiff and said Central Vermont Railway, Inc., are operated in the handling of their traffic, and said Commission has approved of or established maximum joint rates between and over said rail and water route.

[fol. 6] VIII. That all merchandise transported by the plaintiff is transported by it between points in the continental United States over a through route recognized by the Interstate Commerce Commission for which rate tariffs have been filed with said Commission and said through route is in part over Canadian rail lines and plaintiff's connecting water facilities.

IX. That plaintiff has duly filed tariffs and concurrences in its own name with said Interstate Commerce Commission and otherwise has duly complied with the Act to Regulate Commerce.

X. That upon the passage of the Panama Canal Act (paragraphs 9-12, Section 5 of the Act to Regulate Commerce) Central Vermont Railway Company, the predecessor of Central Vermont Railway, Inc., made application to the Interstate Commerce Commission for authority to own the stock of the plaintiff and to operate in connection with plaintiff's steamships, and upon said application to the Interstate Commerce Commission, said Central Vermont Railway Company made full disclosure to the Interstate

Commerce Commission that all of its stock was owned by Grand Trunk Railway Company of Canada, and the ownership of said stock and the operation of the plaintiff by said Central Vermont Railway Company was approved by the Commission and declared to be in the public interest.

XI. That during the year, 1930, Central Vermont Railway, Inc., made application to the Interstate Commerce Commission to acquire and operate properties formerly [fol. 7] owned by Central Vermont Railway Company and duly made special application to own the stock of Central Vermont Transportation Company and to transport property in connection with the steamships, "New York" and "New London" as part of its railroad operation; that at the same time, Canadian National Railway Company made application to the Interstate Commerce Commission to acquire and own the stock of Central Vermont Railway, Inc., and both such applications were approved and declared to be in the public interest.

XII. That all freight transported on said steamships "New York" and "New London" is railroad freight moving on through bills-of-lading issued at New York by plaintiff in case of Westbound freight or at railroad points of origin to New York in case of Eastbound freight; that all such bills-of-lading on such freight are issued in accordance with the Act to Regulate Commerce and the Bill-of-Lading Act.

XIII. That neither of said steamships receives nor carries any merchandise between New York and New London, Connecticut, but only such merchandise as is destined to or received from inland railroad points; and the amount of merchandise carried between New York and New England railroad points constitutes about one-third of the merchandise transported upon said ships.

XIV. That plaintiff is an insurer of the merchandise transported upon its steamships and is responsible for the safe carriage and delivery to the consignee or owner thereof.

[fol. 8] XV. That on or about the 9th day of May, 1933, Central Vermont Railway, Inc., received at its station in St. Albans, Vermont, a box of merchandise consigned to Henry Allen, New York, New York; that while said box

of merchandise was in transit and in the possession of the plaintiff and was moving over said through route under and pursuant to the authority of the Interstate Commerce Commission and upon a proper through bill-of-lading, said box of merchandise was wrongfully and unlawfully seized and retained by the defendant claiming to act by some authority vested in him as Collector of Customs of the Port of New York, and he wrongfully threatens to cause the same to be forfeited under some claimed law of the United States to the loss and damage of plaintiff to the value thereof; that in disregard of plaintiff's rights, defendant threatens and intends to seize and forfeit all merchandise transported by the plaintiff which is shipped between New York and New England points, and unless enjoined by this Court from so doing will do plaintiff irreparable damage, subject it to a multitude of suits in order to protect its rights, with the result that the value of plaintiff's business and the profitable use of its property will be totally destroyed and plaintiff will suffer injury which cannot be compensated in damages.

And plaintiff prays that upon the final hearing of this cause, it be ordered and decreed that the defendant surrender to plaintiff said seized box of merchandise, and defendant, his agents, servants and employees be enjoined and restrained from interfering with the plaintiff's busi-
[fol. 9] ness or the merchandise or property transported by it, and for such other general relief as may to the Court be deemed just and equitable.

Wallace R. Foster, Solicitor for Plaintiff, Office & Post Office Address: 140 Nassau Street, New York City, N. Y.

Duly sworn to by E. Deschenes. Jurat omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

Upon the subpœna and bill of complaint herein and the annexed affidavit of Horace H. Powers, verified the 13th

day of May, 1933, and after hearing Wallace R. Foster, Esq., solicitor for the plaintiff, and Ira Koenig, Esq., solicitor for the defendant.

Let the defendant show cause at a Stated Term for motions to be held in Court Room No. 235, in the Old Post-Office Building, Borough of Manhattan, New York, on the 23rd day of May, 1933, at 10:30 A. M., or as soon thereafter as counsel can be heard why an injunction should not be issued enjoining and restraining the defendant, his agents, servants and employees from interfering with plaintiff's business or the merchandise transported by it on the ground that the defendant, his agents, servants or em-
[fol. 11] ployees have no jurisdiction over or lawful right to interfere with the plaintiff's business or the merchandise or the property transported by it, and sufficient reason appearing therefor, it is

Ordered that service of a copy of this order and the papers upon which it is granted on the defendant's attorney on or before the 18th day of May, 1933, shall be deemed sufficient service, and it is

Further ordered that the defendant, his agents, servants and employees be, and they hereby are enjoined and restrained from further interfering with plaintiff's business or the merchandise or property transported by it until the further order of this Court.

Dated May 17th, 1933.

Alfred C. Coxe, United States District Judge.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HORACE H. POWERS

STATE OF VERMONT,
County of Franklin, ss:

Horace H. Powers, being duly sworn, deposes and says that he resides at St. Albans, Vermont, and is a Director of and General Attorney for the above-named Central Vermont Transportation Company which is a common carrier of freight and was incorporated under the laws of Maine on November 12, 1908. It was conceived and caused to be

incorporated by Central Vermont Railway Company so as to accomplish an extension of its rail line, across Long Island Sound, from New London, Connecticut to New York City, and has never been otherwise operated. The stock of the Central Vermont Transportation Company was all purchased by Central Vermont Railway Company, the predecessor of Central Vermont Railway, Inc. At that time, [fol. 13] substantially all of the stock of Central Vermont Railway Company was owned by Grand Trunk Railway Company of Canada, the predecessor of Canadian National Railway Company.

The boats "New London" and "New York" were built in the United States and were enrolled and documented under the laws of the United States. These boats were acquired by Central Vermont Transportation Company in 1909. These boats were constructed and are only suitable for operation on Long Island Sound. These boats are designed, and are only suitable for the carriage of freight in connection with a railroad operation.

These boats, "New London" and "New York," have been in continuous operation from 1909 to date, from New London to New York, as a part of the Central Vermont Railway route. These boats have been owned by Central Vermont Transportation Company, a Maine Corporation, continuously from 1909 to date. The stock of Central Vermont Transportation Company has all been owned (except qualifying directors' shares) continuously from 1909 to date by Central Vermont Railway, Inc., or its predecessor, Central Vermont Railway Company, both of whom are American corporations. Substantially all of the stock of Central Vermont Railway, Inc., and its predecessor, Central Vermont Railway Company, in turn, has been owned (except qualifying directors' shares) continuously from 1909 to date by Canadian National Railway Company, or its predecessor, Grand Trunk Railway Company of Canada, both of whom are Canadian corporations.

[fol. 14] These two boats, "New London" and "New York," handle no traffic except (1) common carrier freight traffic destined to or received from points on Central Vermont Railway and (2) common carrier freight traffic destined to or received from points beyond Central Vermont Railway transported by that railroad. Nor has Central Vermont Transportation Company ever owned or operated any boats except to carry such traffic as a part of a

railroad operation. Central Vermont Transportation Company files tariffs and concurrences in its own name with the Interstate Commerce Commission and otherwise has complied with the Act to Regulate Commerce. Approximately 33 per cent of all freight transported in these boats is received from or destined to points on the line of Central Vermont Railway.

Upon the passage of the Panama Canal Act, (paragraphs 9-11 of Section 5 of the Act to Regulate Commerce) Central Vermont Railway Company, the predecessor of Central Vermont Railway, Inc., made application to the Interstate Commerce Commission for authority to own the stock of Central Vermont Transportation Company and to operate in connection with said boats. A full disclosure was made to the Interstate Commerce Commission that substantially all of the stock of Central Vermont Railway Company was owned by Grand Trunk Railway Company of Canada. The stock ownership and operation of Central Vermont Transportation Company by Central Vermont Railway Company was approved and declared to be in the public interest.

40 I. C. C., 589.

[fol. 15] Subsequently and in 1930, Central Vermont Railway, Inc., made application to the Interstate Commerce Commission to acquire and operate the properties formerly owned by Central Vermont Railway Company. Central Vermont Railway, Inc., made special application to own the stock of Central Vermont Transportation Company and to transport freight in connection with the boats "New London" and "New York" and as a part of the railroad operation. At the same time Canadian National Railway Company made application to the Interstate Commerce Commission to own the stock of applicant, Central Vermont Railway, Inc. Both applications were approved and declared to be in the public interest.

158 I. C. C., 397.

The fact is, and the Interstate Commerce Commission has so found, that Central Vermont Transportation Company is but a "bridge" to carry Central Vermont Railway freight between New London and New York.

All freight handled on the boats "New London" and "New York" is railroad freight moving on through bills-

of-lading issued at New York in case of Westbound freight or at points of origin to New York in case of Eastbound freight. The bills-of-lading are issued on such freight in accordance with the Act to Regulate Commerce and the Bill-of-Lading Act.

The President and Managing Directors of Central Vermont Transportation Company are citizens of the United States and the corporation is organized under the laws of [fol. 16] that country. The two boats "New London" and "New York" were built in the United States and are properly enrolled and licensed under the laws of the United States and have their home port at Portland, Maine.

Since 1909 continuously to date, Central Vermont Transportation Company and Central Vermont Railway, Inc., or its predecessor, Central Vermont Railway Company, have been and now are engaged in the transportation of property partly by railroad and partly by water under a common control, management and arrangement for a continuous carriage or shipment between New York City and points in the States of Connecticut, Massachusetts and Vermont, by rail and by water; and by common arrangement between themselves and Canadian National Railway Company or its predecessor, Grand Trunk Railway Company of Canada, have constituted and still constitute a through route over which property is transported between New York City and New England points in the East and Chicago and other points in the West, in Westward and Eastward movement.

All merchandise transported in the boats "New London" and "New York" between points in the continental United States is transported over or upon a through route recognized by the Interstate Commerce Commission and for which rate tariffs have been filed with said Commission, and said through route is in part over Canadian rail lines and the Connecting water facilities of Central Vermont Transportation Company. St. Albans, Vermont, is a Central [fol. 17] Vermont Railway point on the through route described in this and the next preceding paragraph. The merchandise involved in this proceeding moved by railroad from St. Albans, Vermont over the Central Vermont Railway, Inc., to New London, Connecticut; thence over the line of Central Vermont Transportation Company in one of its boats, the "New York" or the "New London" to New York City, which transportation from St. Albans to New York

is on the through route described in this and the next preceding paragraph.

That on or about the 9th day of May, 1933, Central Vermont Railway, Inc., received at its station in St. Albans, Vermont, a box of merchandise consigned to Henry Allen, New York, New York; that while said box of merchandise was in transit and in the possession of the plaintiff and was moving over said through route under and pursuant to the authority of the Interstate Commerce Commission and upon a proper through bill-of-lading, said box of merchandise was wrongfully and unlawfully seized and retained by the defendant claiming to act by some authority vested in him as Collector of Customs of the Port of New York, and he wrongfully threatens to cause the same to be forfeited under some claimed law of the United States to the loss and damage of plaintiff to the value thereof; that in disregard of plaintiff's rights, defendant threatens and intends to seize and forfeit all merchandise transported by the plaintiff which is shipped between New York and New England points, and unless enjoined by this Court from so doing will do plaintiff irreparable damage, subject it to a [fol. 18] multitude of suits in order to protect its rights, with the result that the value of plaintiff's business and the profitable use of its property will be totally destroyed and plaintiff will suffer injury which cannot be compensated in damages.

That plaintiff has commenced this action against the defendant in this Court for an injunction restraining the defendant, his agents, servants and employees from interfering with the plaintiff's business or the merchandise or property transported by it; that deponent, as attorney and director of plaintiff, is thoroughly familiar with the facts and circumstances regarding the business and operations of the plaintiff and of the matters alleged in its bill of complaint and verily believes that plaintiff has a good cause of action upon the merits; that this application is made for an order requiring the defendant to show cause why a preliminary injunction should not be granted containing a stay prohibiting the defendant from interfering with plaintiff's business until the hearing and determination of plaintiff's application for a temporary injunction in order to prevent defendant from destroying the business and value of plaintiff's property.

Horace H. Powers.

Sworn to before me, this 13th day of May, 1933. J. B. Wood, Notary Public. My comm. expires Feb. 10, 1935. (Seal.)

(County Clerk Certificate.)

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HARRY M. DURNING, COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK

Harry M. Durning, being duly sworn, deposes and says:

I am the Collector of Customs for the Port of New York and am named as the defendant in the above entitled suit in equity.

On May 12th last a Customs Inspector connected with my office made a seizure of one crate containing a water heater, consigned to H. M. Allen, notify J. M. Adams, at Pier 29, East River. This shipment originated at St. Albans, Vermont, and the package is now being held in the Government's seizure room. The seizure was made from my office at the direction of the Attorney General of the United States and the Secretary of Commerce. Thereafter, this bill in equity was filed to enjoin this and further seizures of merchandise carried over the complainant's route.

The Central Vermont Transportation Co. operates two boats between the Ports of New London, Conn., and New [fol. 20] York City, and it is contended that this operation is illegal and in violation of Section 27 of the Merchant Marine Act of 1920 (46 U. S. C. 883).

I had been informed that although the Department of Commerce was aware of the use of these boats in the transportation of merchandise in interstate commerce it was only recently that it came to its attention that the stock of the complainant was not 75% American owned, as required by Sections 27, 37 and 38 of the Merchant Marine Act of 1920 (46 U. S. C. 888, 802).

It is not disputed that the stock of the complainant, a domestic corporation, was wholly owned by the Central

Vermont Railway, Inc., also a domestic corporation whose stock in turn is owned by the Canadian National Railways, Inc., a Canadian corporation.

The facts contained in the moving papers and the bill of complaint are conceded for the purpose of this argument, but it is pointed out to the Court that the concessions so made do not carry over to conclusions and argumentative deductions therefrom.

The only fact which I deem pertinent in this proceeding is that merchandise is being transported between points in the United States on vessels not owned by United States citizens, as required by the provisions of Section 27 of the Merchant Marine Act. This foregoing statement is conceded to be accurate by the complainant but it is contended only that as a matter of law the particular provision heretofore referred to does not include within its terms its operations.

[fol. 21] The facts are not in dispute, and I have been informed by the United States Attorney for the Southern District of New York, my counsel, that the seizure made by me was proper and it is therefore respectfully submitted that the motion for preliminary injunction be denied and the bill in equity be dismissed for failure to state a cause of action.

(Sgd.) Harry M. Durning.

Sworn to before me, this 26th day of June, 1933.

———.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS

SIR: Please take notice that upon the bill of complaint herein and upon all the proceedings and pleadings hereto-

[fol. 22] fore had herein, the undersigned will move this Court at a stated term thereof for motions to be held in Room 235, United States Courts and Old Post Office Building, Borough of Manhattan, City of New York, on the 20th day of June, 1933, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for

an order dismissing the bill of complaint herein on the ground that it does not state facts sufficient to constitute a cause of action and for lack of equity, and for such other and further relief as to the Court may seem just and proper.

Dated New York, N. Y., June —, 1933.

Yours, etc., George Medalie, United States Attorney for the Southern District of New York, Attorney for Defendant Harry M. Durning, Collector of Customs at the Port of New York, Office and Post Office Address: U. S. Courts and Old P. O. Bldg., Borough of Manhattan, City of New York.

To Wallace R. Foster, Esq., Solicitor for the Plaintiff, 140 Nassau Street, New York, N. Y.

[fol. 23] In United States District Court, Southern District of New York

In Equity

Nos. 76-38

Central Vermont Transportation Company, Plaintiff,

against

Harry M. Durning, Collector of Customs at the Port of New York, Defendant

In Equity. Motion for preliminary injunction to restrain defendant from seizing and causing to be forfeited merchandise transported on the plaintiff's boats from New London, Conn., to New York City; and cross motion to dismiss complaint for insufficiency.

Wallace R. Foster (Horace H. Powers of Counsel), Attorney for Plaintiff.

George Z. Medalie (Ira Koenig of Counsel), United States Attorney.

OPINION

F. J. COLEMAN, J.:

Memorandum

The principal question presented is the proper construction of the proviso of Section 27 of the Merchant Marine Act of 1920 (46 U. S. C. 883). That section in so far as [fol. 24] applicable reads as follows:

"*Transportation of merchandise between points in United States in other than domestic built and documented vessels.* No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by Sections 13 or 808; *Provided*, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities. * * *"

The plaintiff owns and operates two freight steamers between New London, Conn., and New York City and the defendant as collector of Customs at the latter port has seiezd one shipment of merchandise under the above statute and threatens to continue to do so. All the facts are undis-[fol. 25] puted and a pure question of law is presented as to his right and authority. Though the plaintiff is a Maine Corporation, it is deemed to be not an American citizen within the meaning of the Statute because of the ownership of its stock; so that the fact that the boats were built and documented under the laws of the United States does not invalidate the seizure of the merchandise transported on them if the proviso of the statute is inapplicable.

The Interstate Commerce Commission has taken some jurisdiction over the plaintiff and the routes involved. The Central Vermont Railway, Inc., owns and operates a railroad from Canada to New London, Conn., and with the approval and consent of the Commission it owns all the stock of the plaintiff (except directors' qualifying shares) which owns and operates the boats in question. All of the stock of the Central Vermont Railway, Inc., is in turn owned by the Canadian National Railway Company with the consent and approval of the Commission. In that system the boats in question perform merely the function of a "bridge" between the New London terminus and New York City. They carry no freight other than what has been transported over the Central Vermont Railroad or what is destined for such transportation, all under through bills of lading issued in accordance with Governmental regulations. The Commission has recognized the various routes over which such transportation is conducted and tariff schedules have been duly filed for all of them. All of the merchandise carried by the boats has been or is destined to be transported over [fol. 26] such recognized routes; as to about ⅓ of the merchandise, the routes lie entirely within the United States, but as to the other ⅔, the routes lie partially through Canada.

The Government contends that if the route lies entirely within the United States the merchandise is forfeitable under the statute quoted; but that where the route is partially in Canada the proviso is applicable. The system has been operated as above described since 1909 and though thirteen years have elapsed since the passage of the statute the question is now raised for the first time as to the plaintiff's right to continue what the Interstate Commerce Commission has approved. The merchandise seized by the defendant was shipped from St. Albans, Vermont, consigned to a person in New York City and the defendant threatens to seize all other merchandise shipped from New England States over this route though it is conceded that if it had been shipped from Chicago or some other point within the United States so located that the transportation would be partially through Canada, the proviso would be given protection.

In construing the statute, it should be recognized that its fundamental purpose is to protect American shipping.

It creates quite a strain on the imagination to think of these two boats as foreign, but they may be assumed to be so. The statute concededly authorizes them to carry freight which has been shipped over the system from some point in the United States provided the route lay in part in Canada. It is a little difficult to see why Congress should have [fol. 27] sought to protect American shipping by forbidding these boats to carry goods which had also been shipped from a point within the United States but over a route which did not enter Canada. What possible connection is there between the incidental passing through a part of Canada and the protection of American shipping? It was the general intention of Congress to withhold the protection to American shipping where foreign owned boats were carrying merchandise over a part of a through route recognized by the Interstate Commerce Commission; in other words, Congress apparently desired not to interfere with operations which had been approved by its chosen instrument of supervision. The operation which the Government after thirteen years claims to be illegal has beeen approved by the Interstate Commerce Commission in so far as it had jurisdiction; and all the merchandise is transported over through routes to and from New York City which the Commission have recognized and for which tariffs have been duly filed; and the relations between the plaintiff, the Vermont Central Railway, Inc., and the Canadian National Railway Company have been approved by the Commission. To hold that the plaintiff must discontinue part of that business because the merchandise did not pass through a part of Canada would be contrary to the general intention of Congress and should not be done unless the words used in the proviso compel it. The effect would be to deprive the New England States of transportation facilities which are afforded to the Middle Western places in the United States merely because en route the merchandise does not enter Canada.

[fol. 28] It seems to me that the apparent purpose of Congress can be accomplished by construing the words, "over through routes recognized by the Interstate Commerce Commission" as not requiring transportation over the entire route. St. Albans, Vermont, and all the other points from which shipments are claimed to be unauthorized, are on through routes which "are in part over

Canadian Rail Lines"; and shipments from those points are "over" such routes though the entire route is not traversed.

For these reasons it seems to me that a preliminary injunction should issue to prevent interference with a practice of such long standing until a final determination.

It is appropriate that the Court should expressly recognize the exceptionally helpful briefs submitted by counsel for both sides. In their clarity of thought, comprehensiveness of research and fairness of statement of the law, counsel have earned the appreciation of the Court.

Motion to dismiss complaint is denied and motion for preliminary injunction granted. Settle orders on notice.

——, U. S. D. J.

July 24, 1933.

[fol. 29] IN UNITED STATES DISTRICT COURT

In Equity

Nos. 76-38

Present: Hon. Frank J. Coleman, United States District Judge.

CENTRAL VERMONT TRANSPORTATION COMPANY, Plaintiff,

against

HARRY M. DURNING, Collector of Customs at the Port of New York, Defendant

ORDER GRANTING PRELIMINARY INJUNCTION—July 28, 1933

The plaintiff in the above entitled action, having moved this Court for a preliminary injunction and the defendant having moved for an order dismissing the bill of complaint on the ground that the facts therein stated are insufficient to constitute a cause of action, and for lack of equity, and after reading the plaintiff's order to show cause, dated May 17th, 1933, the bill of complaint, subpœna, affidavit of Horace H. Powers verified the 13th day of May, 1933; the defendant's notice of motion dated June 6th, 1933, and

[fol. 30] the affidavit of Harry N. Durning, verified the 26th day of June, 1933, and both motions having come on to be heard at a stated term for motions in this Court, on the 27th day of June, 1933, and after hearing Wallace R. Foster, Esq., attorney for plaintiff, and Horace H. Powers, Esq., of counsel, in favor of the motion for the injunction and in opposition to the motion to dismiss the complaint, and George Z. Medalie, United States Attorney for the Southern District of New York, by Ira Koenig, Esq., Assistant United States Attorney, of counsel, attorney for the defendant in opposition to plaintiff's motion for the injunction and in favor of defendant's motion to dismiss the bill of complaint, and, after due deliberation, it is, on motion of Wallace R. Foster, Esq., attorney for plaintiff,

Adjudged, ordered and decreed, for reasons stated in writing and made a part of the record, that the injunction be issued as prayed in the bill of complaint and remain in force until the further order of the Court, and it is

Further ordered, that the motion made by defendant to dismiss the bill of complaint herein on the ground that the facts therein stated are insufficient to constitute a cause of action and for lack of equity, be and the same is in all respects denied.

Frank J. Coleman, United States District Judge.

[fol. 31] In United States District Court, Southern District of New York

[Title omitted]

Petition and Allowance of Appeal

The above named Harry M. Durning, Collector of Customs of the Port of New York, feels himself aggrieved by the order entered in this case on July 28, 1933, whereby he appeals from said order to the Circuit Court of Appeals for the Second Circuit.

And the said defendant accordingly prays that the said appeal be allowed.

George Z. Medalie, United States Attorney for the Southern District of New York, Attorney for the Defendant.

On the foregoing notice of appeal and petition for the allowance thereof, it is

Ordered that the appeal prayed for by the defendant Harry M. Durning be and the same hereby is allowed.

Robert P. Patterson, United States District Judge.

Dated New York, August 8th, 1933.

[fol. 32] In United States District Court

[Title omitted]

Assignments of Error

Now comes Harry M. Durning, Collector of Customs of the Port of New York, and makes and files his assignment of errors.

1. The District Court erred in granting the application of the plaintiff for a preliminary injunction.

2. The District Court erred in denying the motion of the defendant to dismiss the bill of complaint for insufficiency and want of equity.

3. The District Court erred in holding that the transportation of merchandise from St. Albans, Vermont, to New York City over ships owned by the Central Vermont Transportation Company, was within the proviso contained in Section 27 of the Merchant Marine Act of 1920 (46 U. S. C. 883).

[fols. 33 & 34] Wherefore, defendant prays that the order of the District Court be reversed and the motion of the defendant to dismiss the bill in equity be granted.

Yours, etc., George Z. Medalie, United States Attorney for the Southern District of New York, Attorney for the Defendant.

Citation, in usual form, omitted in printing.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties. Dated October 3rd, 1933.

Wallace R. Foster, Attorney for Plaintiff. George Z. Medalie, United States Attorney, Attorney for Defendant.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CENTRAL VERMONT TRANSPORTATION COMPANY, Complainant-Appellee,

against

HARRY M. DURNING, Collector of Customs of the Port of New York, Defendant-Appellant

Appeal from United States District Court for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

From an order granting a temporary injunction restraining the defendant-collector from seizing and forfeiting under Section 27 of the Merchant Marine Act of 1920 certain merchandise transported by the complainant, and denying a motion to dismiss the bill of complaint, the defendant appeals. Modified.

Martin Conboy, United States Attorney, for defendant-appellant; Samuel C. Coleman and Edward J. Ennis, Assistant United States Attorneys, of counsel.

Wallace R. Foster, Solicitor for Complainant-appellee; Horace H. Powers, of counsel.

[fol. 38] AUGUSTUS N. HAND, Circuit Judge:

This appeal is by the defendant, Collector of Customs of the Port of New York, from an order which denied a motion to dismiss the bill of complaint and restrained him from seizing and forfeiting certain merchandise shipped on the Central Vermont Railway, Inc., at St. Albans, Vermont, consigned to one Allen, at New York City, under a through bill of lading.

So far as the order appealed from denied the motion to dismiss the bill it is not now subject to review because it is not final and the cause is still open for trial on the pleadings. We shall, therefore, review only the portion of the order which granted an injunction pendente lite.

The Complainant Central Vermont Transportation Company was incorporated under the laws of Maine in 1908, and its stock, except certain directors' qualifying shares, was owned by the Central Vermont Railway Company, the stock of which was in turn owned by the Grand Trunk Railway Company, a Canadian corporation. In 1909, the complainant purchased two vessels, The New York and The New London, built in the United States and documented under the laws of the United States, and has continuously operated them between New London and New York. In 1923, the Canadian National Railway Company, also a Canadian corporation, acquired the Grand Trunk Railway Company. In 1929, the Central Vermont Railway, Inc., acquired the property of the Central Vermont Railway Company, and the Canadian National Railway Company acquired all the stock except directors' qualifying shares of the Central Vermont Railway, Inc. Central Vermont Transportation Company and Central Vermont Railway, [fol. 39] Inc., are engaged in transportation of property partly by railroad and partly by water under common control for a continuous carriage between points in the States of Connecticut, Massachusetts and Vermont and New York City and return by rail and by water. It also transports merchandise originating at points in the western States which is routed over Canadian rail lines and thence over the Central Vermont and its connecting water carrier. All the merchandise transported in the boats New London and New York between points in the United States is transported over the whole or a part of a through route recognized by the Interstate Commerce Commission for which route tariffs have been filed with the Commission and such through route is in part over Canadian rail lines.

The merchandise involved in this proceeding moved by railroad from St. Albans, Vermont, over the Central Vermont Railway, Inc., to New London, Connecticut, thence over the Central Vermont Transportation Company in one of its boats, the New York or the New London, to New York City, which transportation from St. Albans to New York is on a part of the through route herein described. While the merchandise was in the possession of the complainant under a through bill of lading it was seized by the defendant as Collector of Customs for forfeiture under

Section 27 of the Merchant Marine Act of June 5, 1920. That Act provides as follows:

"No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a ves- [fol. 40] sel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 13 or 808: Provided, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities * * *." (U. S. Code Title 46, §883.)

The steamboats, New York and New London, are not owned by citizens of the United States. This fact is evident from the definition of Section 38 of the Merchant Marine Act of 1920 which says that no corporation

"shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States"

and that

"the controlling interest shall not be deemed to be owned by citizens of the United States (a) if the title is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States * * *".

The Central Vermont Railway, Inc., an American corporation, owns the stock of the Central Vermont Transportation Company, but in turn is owned by the Canadian National Railway Company, a Canadian corporation, so that the Transportation Company is not a citizen within the

meaning of Section 38 because, under that statute, inter-
[fol. 41] vening holding companies make no difference and ultimate beneficial ownership controls. Such ownership is Canadian.

St. Albans, Vermont, where the freight was shipped, is on a through route from western points in the United States to New York, which is in part over Canadian rail lines and their water carriers, and is recognized by the Interstate Commerce Commission as such. The Central Vermont Transportation Company filed tariffs with the Commission in its own name.

Approximately thirty-three per cent of all freight transported in its steamboats is received from or destined to points in New England on the line of the Central Vermont Railway. The remainder comes from interior points in the west through Canada and thence over the lines of the Central Vermont Railway, Inc., to the boats of the Central Vermont Transportation Company. The Transportation Company has never employed its boats to carry traffic except as a part of a railroad operation.

Upon the passage of the Panama Canal Act (Section 5, Paragraphs 9-11 of the Act to regulate commerce) the Central Vermont Railway Company applied to the Interstate Commerce Commission for authority to own the stock of the Transportation Company and disclosed that substantially all its stock belonged to the Grand Trunk Railway Company. Subsequently, in 1930, the Central Vermont Railway, Inc., made a similar application and the Canadian National Railway made application for leave to own the stock of Central Vermont Railway, Inc. Each of these applications was approved and declared to be in the
[fol. 42] public interest.

The District Court held that the shipment in question came within the proviso of Section 27 of the Merchant Marine Act of June 5, 1920, and granted an injunction pendente lite accordingly. With this conclusion we cannot agree.

It is argued by the complainant that Section 27 of the Merchant Marine Act does not apply to it or to the merchandise it transports because of the paramount jurisdiction of the Interstate Commerce Commission. This argument is sought to be enforced by the language of Section 33 of the Shipping Act of September 7, 1916, which reads:

"* * * this Act shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confer upon the board concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission; nor shall this Act be construed to apply to intrastate commerce." 39 Stat. L. 732.

Section 1, paragraph (1) (a) of the Interstate Commerce Act (41 Stat. L. 474) provides that such Act shall apply to:

"The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment."

Section 6, (13), (37 Stat. L. 568), provides that:

"When property may be or is transported from point to point in the United States by rail and water * * * the transportation being by a common carrier or carriers, and [fol. 43] not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, * * *"

"(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

We can see no reason for supposing that the jurisdiction given the Interstate Commerce Commission "to establish through routes and maximum joint rates between and over such rail and water lines" is in any way in conflict with the later statutory requirements of Section 27 of the Merchant Marine Act. The provisions are entirely compatible, relate to different matters, and may, without difficulty, be read together. The Interstate Commerce Act undoubtedly gives authority to the Commission to establish through routes and joint rates and, under Section 5, (11), (37 Stat. L. 566), to permit water carriers belonging to railroads, if operated in the interest of the public, to continue such operation under common ownership, though otherwise competing. But this jurisdiction does not affect carriage pre-

hibited by Section 27 of the Merchant Marine Act. Indeed, it is difficult to comprehend the force of the argument that the latter section is not applicable.

The complainant particularly insists that Section 27 is not applicable because of the terms of the Proviso. We have [fol. 44] demonstrated that the vessels involved in the case are not "owned by persons who are citizens of the United States" within the meaning of the Act. It remains to determine whether, in spite of this, the Proviso covers the situation here.

The Proviso by its express terms only excepts "merchandise transported between points within the continental United States * * * over through routes recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall be filed with said Commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities * * *".

The complainant attempts to claim exemption under this proviso upon the theory that "over through routes" means "over" any part of such routes. This does violence to the language and defeats the purpose of the proviso as well.

The enacting clause of Section 27 expresses a very old governmental policy. Chapter 2, Section 5, (1 Stat. L. 24, 27) of the Act of July 4, 1789, of the First Congress preferred vessels owned by our own citizens by allowing a discount on duties paid for goods imported in such vessels. Chapter 31, Section 4, of the Act of March 1, 1817, (3 Stat. L. 351) prohibited importation of merchandise from one port of the United States to another such port in "a vessel belonging wholly or in part to a subject of any foreign power" under pain of forfeiture. Chapter 201, Section 20, of the Act of July 8, 1866, (14 Stat. L. 182) aimed to prevent evasion of duties along the Canadian border, provided that merchandise carried from any port of our northern, northeastern or northwestern frontiers in a foreign vessel to a foreign port and then reshipped to any other port of [fol. 45] the United States on such frontiers in order to evade Section 4 of the Act of 1817, should be subject to forfeiture. This legislation was ameliorated by Chapter 213, Section 4 of the Act of March 1, 1873, (17 Stat. L. 463) so far as to permit subjects of Great Britain, without payment of duty, to carry merchandise in British vessels from one

place in the United States to another upon the St. Lawrence River, the Great Lakes and the rivers connecting the same, provided part of such transportation was through the Dominion of Canada by land carriage and in bond (R. S. § 4347). This local exemption in pursuance of the Treaty with Great Britain of May 8, 1871, (17 Stat. L. 873 was repealed March 3, 1883, (22 Stat. L. 641) upon the expiration of the Treaty. Our legislative policy continued without amelioration and indeed was stiffened by Chapter 117 of the Act of February 15, 1893, (27 Stat. L. 455) which forbade shipments in foreign vessels from one port of the United States to another via a foreign port and by Chapter 26 of the Act of February 17, 1898 (30 Stat. L. 248) which forbade shipments in foreign owned vessels from one United States port to another "either directly or via a foreign port or for any part of the voyage." As these provisions were thought not to cover transportation that was partly by water and partly by land (30 Opinions Atty. Gen. 3), the law was extended under Section 27 of the Merchant Marine Act by adding the words "or by land and water" to existing provisions so as wholly to reserve coastwise trade for citizens of the United States. The bill as originally introduced did not contain the Proviso and was calculated to disturb established routes between the northwest and the east through the Lake ports over water con-
[fol. 46] nections of Canadian rails to and from the eastern markets.

The nature of the problem is shown by the decision of the Interstate Commerce Commission in Rail-Lake-and-Rail Rates Between United States Points via Canadian Lines, 96 I. C. C. 633 (1925). There an attempt was made to suspend through rates established over Canadian routes, but the Commission held that American owned water routes such as from Duluth to Buffalo and then over American rails to eastern points in the United States were insufficient to handle all the traffic and that it was advantageous to our trade to move from Duluth to Sarnia, Ontario, and from Chicago and Milwaukee to Depot Harbor, and then by Canadian and American rails to eastern points. These foreign water routes through the Great Lakes, when recognized by the Commission, were intended to be exempted from Section 27, and the bill, as first introduced, was amended by adding the Proviso in order to exempt merchandise using these Canadian rail and connecting water routes.

It is evident that an interpretation of the Proviso that would permit carriage in foreign owned vessels over any part of a through route would defeat the long established policy of Congress. The Proviso clearly related only to shipments over (and not merely on some part of) through routes and actually over a Canadian rail line. The single exception to our national policy allowed by Section 27 and intended only to affect routes along the Great Lakes and the St. Lawrence River, if extended in the manner complainant desires would enable foreign owned vessels to carry merchandise on any of our own waters by the simple expedient of filing tariffs showing participation in routes [fol. 47] exempted by the proviso.

While we regret the result we are forced to reach, we feel convinced that the merchandise here did not move over a through route that was "in part over Canadian rail lines and their own or other connecting water facilities" but, on the contrary, moved over a route that began in Vermont and ended in New York with no intervening Canadian rail lines at all. The provincial policy which prevents shipments made in New England from being carried on complainant's steamers is something we may deplore but cannot control. The exclusion of such freight from transportation is doubtless an inconvenience to many American customers of Central Vermont Railway, Inc., and a disturbance of a course of traffic that has been of long standing, but Section 27 of the Merchant Marine Act seems to us clear and peremptory, and, on the face of the papers submitted on the motion for an injunction, the merchandise in question is subject to forfeiture.

Finally it is argued that the construction we have placed on Section 27 violates the Fifth Amendment of the Constitution. We can see no basis for this contention. The transportation we are dealing with would always have been illegal but for the fact that the complainant was an American corporation and, prior to the enactment of Section 38 of the Merchant Marine Act, control of its stock by a Canadian company would not have made the "New York" and "New London" foreign owned vessels. We cannot believe that statutory recognition that the beneficial ownership was in a Canadian corporation and that the steamboats were thereby foreign owned and thus within the prohibition of Section 27 was beyond the powers of Congress. It did

[fol. 48] not involve the taking of the property of the complainant for the latter was at liberty to sell its vessels at any time. Moreover, the Canadian National Railway Company could dispose of the stock of the Central Vermont Transportation Company if its steamboats could not be operated profitably when limited to carrying merchandise that came over through routes. The statutory restrictions here are no more severe than those prohibiting transportation by a railroad of its own commodities. Such legislation was sustained by the Supreme Court in Del. Lack. & West. R. R. v. United States, 231 U. S. 363. See also Assigned Car Cases, 274 U. S. 564, 575.

The order granting a preliminary injunction is reversed and the appeal from the part of the order denying the motion to dismiss the bill of complaint is dismissed.

[fol. 48a] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Central Vermont Transportation Company, Complainant-Appellee, against Harry M. Durning, Collector of the Port of New York, Defendant-Appellant. Opinion. Augustus N. Hand, C. J.

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 18th day of June, one thousand nine hundred and thirty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

CENTRAL VERMONT TRANSPORTATION COMPANY, Plaintiff-Appellee,

vs.

HARRY M. DURNING, as Collector, etc., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the

Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be, and it hereby is, reversed with costs as to the part granting a preliminary injunction, and the appeal from the part of the order denying the motion to dismiss the bill of complaint is dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 50] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Central Vermont Transportation Co. vs. Harry M. Durning as Collector, etc. Order for Mandate. United States Circuit Court of Appeals. Filed June 18, 1934. William Parkin, Clerk, Second Circuit.

[fol. 51] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 50, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Central Vermont Transportation Co., Plaintiff-Appellee, against Harry M. Durning, as Collector, etc., Defendant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of July, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 52] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,875. U. S. Circuit Court of Appeals, Second Circuit. Term No. 247. Central Vermont Transportation Company, Petitioner, vs. Harry M. Durning, Collector of Customs at the Port of New York. Petition for a writ of certiorari and exhibit thereto. Filed August 2, 1934. File No. 247, O. T., 1934.

2.3

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY,

Petitioner,

vs.

HARRY N. DURNING, COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HORACE H. POWERS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY,

Petitioner,

vs.

HARRY N. DURNING, COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Central Vermont Transportation Company respectfully shows to this Honorable Court:

Statement of Facts and Matters Involved.

On the 15th day of May, 1933, this action was commenced in the District Court for the Southern District of New York to permanently enjoin the Collector of Customs of the Port of New York from seizing and forfeiting under Section 27 of the Merchant Marine Act of 1920, merchandise transported by it.

On the 28th day of July, 1933, Honorable Frank J. Coleman, United States District Judge, made an order in favor of your petitioner, granting an injunction *pendente lite* and denying the defendant's motion to dismiss the bill of complaint.

The defendant appealed from this order to the United States Circuit Court of Appeals for the Second Circuit which handed down a decision on the 11th day of June, 1934, modifying the order appealed from by reversing that part of the order which granted an injunction, and dismissing the appeal from that part of the order denying the motion to dismiss the bill of complaint. Both the District Court and the Circuit Court of Appeals delivered opinions, copies of which are set forth in the record.

Your petitioner, Central Vermont Transportation Company, was incorporated under the Laws of the State of Maine in 1908 and its stock, except directors' qualifying shares, was owned by Central Vermont Railway Company, the stock of which was in turn owned by the Grand Trunk Railway Company, a Canadian corporation. In 1909, your petitioner purchased two vessels, the "New York" and the "New London", which were built in the United States and documented under the laws of the United States, and has continuously operated them between New York and New London. In 1923, Canadian National Railway Company, a Canadian corporation, acquired the Grand Trunk Railway Company. In 1929, the Central Vermont Railway, Inc., acquired the property of Central Vermont Railway Company, and the Canadian National Railway Company acquired all of the stock, except directors' qualifying shares, of Central Vermont Railway, Inc.

Your petitioner and Central Vermont Railway, Inc., or its predecessor, Central Vermont Railway Company, have been continuously engaged since 1909 in the transportation of freight, as common carriers, partly by railroad

and partly by water, under common control for a continuous carriage between points in the States of Connecticut, Massachusetts, Vermont and New York City, and return, by rail and by water, as well as merchandise originating at points in the Western States which is routed over Canadian rail lines, and thence over Central Vermont Railways and your petitioner, its connecting water carrier. All of the merchandise transported in your petitioner's vessels between points in the United States is transported over a whole or a part of a through route recognized by the Interstate Commerce Commission for which route tariffs have been filed with the Commission and such through route is in part over Canadian rail lines.

The Interstate Commerce Commission duly granted authority to Canadian National Railway Company to own the stock of Central Vermont Railway, Inc., as well as authority to Central Vermont Railway, Inc., to own the stock of petitioner, and declared such ownership and operation to be in the public interest. About one-third of all the freight carried in petitioner's vessels is received from or destined to points in New England.

The merchandise involved in this suit moved by railroad from St. Albans, Vermont, over the Central Vermont Railway, Inc., to New London, Connecticut, and thence in one of your petitioner's boats to New York City, which transportation from St. Albans to New York is on a part of a through route, and while the merchandise was in the possession of petitioner under a through bill of lading, it was seized by the Collector for forfeiture under Section 27 of the Merchant Marine Act of June 5, 1920. Your petitioner's vessels neither receive nor carry any merchandise for local shipment between New York and New London, Connecticut, but only such merchandise as is destined to or received from inland railroad points.

Reasons for Granting the Writ.

1. The question involved in this case is one of Federal law, which has not, but should be settled by this Court.

2. The ruling of the Circuit Court of Appeals, if allowed to stand, will have far reaching effect. It will sanction two different governmental agencies controlling the same business causing a conflict of jurisdiction between the Interstate Commerce Commission and the United States Shipping Board in respect of a common carrier by water in common management and control with a railroad. The petitioner in this case is a common carrier by water, all of whose stock, except the qualifying shares, is owned by a common carrier railroad. The decision of the United States Circuit Court of Appeals is that Section 27 of the Merchant Marine Act of 1920 (Act of June 5, 1920, 41 Stat. 999, 46 U. S. Code, paragraph 883) is addressed to such a common carrier by water. Section 27 is but a part of a comprehensive statute regulating common carriers by water, prescribing prohibitions as to rates for transportation, rebates, equality of treatment to shippers and the like, and confiding exclusive regulatory jurisdiction over such common carriers by water to the United States Shipping Board (Act of June 5, 1920, 41 Stat. 988-1088, 46 U. S. Code, paragraphs 861-889, inclusive).

U. S. Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474.

If Section 27 of the Merchant Marine Act of 1920 applies to this petitioner, the whole Act applies to this petitioner. The result is a duplicate system of regulation and a hopeless conflict of jurisdiction over this petitioner between the Interstate Commerce Commission and the United States Shipping Board.

3. The decision of the United States Circuit Court of Appeals produces a drastic curtailment of the jurisdiction of the Interstate Commerce Commission over common carriers by water which are in common management and control with a railroad. The decisions of this Honorable Court have been uniform that "the transportation of * * * property * * * partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment * * *" (Act to Regulate Commerce, as amended, 41 Stat. 474, 49 U. S. Code, paragraph 1, Section 1) is a subject matter within the exclusive jurisdiction of the Interstate Commerce Commission and that Act to Regulate Commerce.

Chicago, R. I. & P. Ry. v. *U. S.*, 274 U. S. 29, at pages 35 and 36.

I. C. C. v. *Goodrich*, 224 U. S. 194.

The decision of the United States Circuit Court of Appeals in the instant case denies this proposition and defeats the exclusive jurisdiction of the Interstate Commerce Commission as announced by this Honorable Court.

4. The decision of the United States Circuit Court of Appeals does violence to the declared protective purpose of the Transportation Act of 1920 (41 Stat. 499, 49 U. S. Code, paragraph 142), which is:

> "It is declared to be the policy of Congress to promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

The decision of the United States Circuit Court of Appeals destroys a common carrier by water and breaks up a rail-water transportation which has the indorsement of

the Interstate Commerce Commission in violation of the declared Congressional intent to preserve them "in full vigor".

5. The decision of the United States Circuit Court of Appeals breaks up a so-called differential through route between Chicago and Detroit in Central Freight Association territory, and New York City in Eastern territory, thereby lessening the transportation opportunities of the shipping public. This service has been in effect for many years and has been of great advantage to the shipping public. The Interstate Commerce Commission has found this service to be in the public interest.

Re Central Vermont Railway, 158 I. C. C. 397.

The destruction of such a through route is a matter of national concern which justifies a review by this Honorable Court.

6. The decision of the United States Circuit Court of Appeals denies to your petitioner the right to handle one-third of its entire traffic, thereby raising a serious question of confiscation of property under the Constitution of the United States. The effect of this decision on petitioner and its parent company, Central Vermont Railway, Inc., is so grave that this Honorable Court should review that decision.

7. It is of great public importance that a uniform and reasonable rule should be laid down by this Honorable Court defining the respective jurisdictions of the Interstate Commerce Commission and the United States Shipping Board.

Prayer for Writ.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit

Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket number E. 76, page 38, Central Vermont Transportation Company against Harry M. Durning, Collector of Customs at the Port of New York, and that the said decision of the said Court of Appeals be reversed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

CENTRAL VERMONT TRANSPORTATION COMPANY,
By E. DESCHENES,
Vice-President.

HORACE H. POWERS,
Counsel for Petitioner.

STATE OF VERMONT,
County of Franklin, ss:

E. Deschenes, being duly sworn, says:

I am the Vice-President of Central Vermont Transportation Company, a corporation duly organized under the Laws of the State of Maine, the petitioner herein; and I have knowledge of this litigation. The foregoing petition and the matters therein set forth are true, to the best of my knowledge, information and belief.

E. DESCHENES.

Subscribed and sworn to before me this 27th day of July, 1934.

[NOTARIAL SEAL.] VIRGINIA M. BROWN,
Notary Public.

I certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

HORACE H. POWERS,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY,

Petitioner,

vs.

HARRY N. DURNING, COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The learned District Judge handed down an opinion which appears in the record on appeal at page 23.

The Circuit Court of Appeals for the Second Circuit handed down an opinion which appears in the record on appeal at page 37.

II.

Jurisdiction.

The date of the decision to be reviewed is June 11th, 1934. This Honorable Court has the right to grant the writ and review the case. Judicial Code, Sect. 240, as amended by the Act of February 13, 1925, 43 Stats. 938; *Harriman* v. *Northern Securities Company*, 197 U. S. 244.

III.

Statement.

The material facts and questions involved are set forth in the foregoing petition.

IV.

Specifications of Error.

1. The learned Circuit Court of Appeals for the Second Circuit erred in deciding to reverse the order of the District Court granting an injunction *pendente lite*.

2. The learned Circuit Court of Appeals erred in holding that the prohibitions of Section 27 of the Merchant Marine Act apply to petitioner or to any merchandise transported by it.

3. The learned Circuit Court of Appeals erred in holding that the proviso contained in Section 27 of the Merchant Marine Act does not expressly except petitioner's shipments.

4. The learned Circuit Court of Appeals erred in holding that Section 27 of the Merchant Marine Act does not violate the rights granted to petitioner by the Fifth Amendment to the Federal Constitution.

V.

ARGUMENT.

Point A.

The Merchant Marine Act, by its own terms, makes Section 27 inapplicable to this petitioner.

Section 33 of the Shipping Act, as amended by the Merchant Marine Act, reads in part as follows:

> "This chapter shall not be construed to affect the power or jurisdiction of the Interstate Commerce

> Commission, nor to confer upon the (Shipping) Board concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission; * * *" (46 U. S. Code, par. 833).

The Circuit Court of Appeals held that the subject matter of Section 27 was not a matter within the "jurisdiction of the Interstate Commerce Commission" and consequently that section was not affected by the exception above recited.

The prohibitions of Section 27, so far as material here, are addressed to the ownership of boats operating in the trade named in the section. In case of a corporation, Section 27 read in connection with Section 2 of the Shipping Act (46 U. S. Code, par. 802) prescribes the ownership of the stock of the corporation owning the boats. It thus becomes clear that Section 27, read in connection with Section 2 of the Shipping Act, is addressed to the questions (1) who may own the boats engaged in the service named and (2) who may own the stock of such owning corporation. The question is whether that jurisdiction had been given to the Interstate Commerce Commission prior to the enactment of the Merchant Marine Act in 1920?

The Panama Canal Act of August 24, 1912 (49 U. S. Code, Par. 5, Sections 10 and 12), reads in part as follows:

> "It shall be unlawful for any railroad company * * * to own, lease, operate, control or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company or by stockholders or directors in common, or in any other manner) in any common carrier by water * * *. If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water * * * is being operated in the interest of the public and is of advantage to the

> convenience and commerce of the people, * * * the Interstate Commerce Commission may by order, extend the time during which such service by water may continue to be operated beyond July 1, 1914."

Section 2 of paragraph 5 of the Interstate Commerce Act (49 U. S. Code, par. 5(2)) reads in part as follows:

> "Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition * * * by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock * * * will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition * * *."

It is admitted that petitioner and its parent company, Central Vermont Railway, Inc., are both common carriers subject to the Interstate Commerce Act, and that they both come within the scope of the two statutes above described. It is admitted that the ownership of these boats and the operation thereof by your petitioner has been approved by the Interstate Commerce Commission.

Re Central Vermont Boat Lines, 40 I. C. C. 589.

It is admitted that the ownership of the stock of your petitioner by Central Vermont Railway, Inc., has been approved by order of the Interstate Commerce Commission.

It is admitted that the ownership of the stock of Central Vermont Railway, Inc., by Canadian National Railway Company has been approved by order of the Interstate Commerce Commission.

Re Central Vermont Railway, 158 I. C. C. 397.

It appears clearly, therefore, that prior to the passage of the Shipping Act and the Merchant Marine Act, the

ownership of boats by a common carrier, and the ownership of its stock by a railroad were both matters confided to the exclusive jurisdiction of the Interstate Commerce Commission. The Commission, acting under its exclusive jurisdiction, has approved the operation by your petitioner and the ownership of its stock.

These questions of the operation of this boat line by your petitioner and the ownership of its stock came under the jurisdiction of the Interstate Commerce Commission prior to the passage of the Shipping Act and the Merchant Marine Act. Consequently, under Section 33 of the Shipping Act, neither that Act nor the Merchant Marine Act have any application to your petitioner or to the ownership of its stock.

POINT B.

The proviso contained in Section 27 of the Merchant Marine Act expressly excepts petitioner's shipments.

(1)

The proviso reads:

> "Provided, that this section shall not apply to merchandise transported between points within the Continental United States * * * over through routes recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall be filed with said Commission when such routes are in part over Canadian Rail Lines and their own or other connecting water facilities."

Petitioner and Central Vermont Railway, Inc., and Canadian National Railway Company (or the predecessors of the latter two railroads) had constituted a duly authorized through route between New York and Western States for many years prior to the enactment of Section 27 of the Merchant Marine Act. It is urged that Congress did not

intend to disturb the flow of traffic on this route; or make it illegal to carry merchandise from New England points to New York, while legal to carry merchandise from Western States to New York. The purpose of the proviso was to cover all merchandise transported over the whole or any part of the route.

The effect of the decision of the Court of Appeals is to read into the statute the words "when such *transportation* is in part over a Canadian Rail Line" while the statute reads "when such *routes* are in part over a Canadian Rail Line".

The learned Court of Appeals thought that if the interpretation claimed by petitioner was adopted the purpose of Congress might be evaded by the simple expedient of filing tariffs showing participation in routes exempted by the proviso.

Congress had already given control to the Interstate Commerce Commission of water lines operated by railroads only where the Commission determined that such operation was in the public interest. Thus, Congress granted authority to the Interstate Commerce Commission only over water lines connected with railroads and the proviso exempts only merchandise transported on such water lines constituting a part of a through route when operated in connection with Canadian Rail Lines.

(2)

The decision of the Circuit Court of Appeals overthrows a settled administrative construction.

For more than twelve years, petitioner had engaged in the now condemned transportation without molestation. Since the statute is highly penal and one which disturbs vested rights, it should be given the strictest construction and one that accords with the administrative construction. *Prussian* v. *U. S.*, 282 U. S. 675.

Point C.

The Merchant Marine Act is a comprehensive statute designed to regulate common carriers by water which are unconnected with railroads.

Section 27 of the Merchant Marine Act is but a part of a comprehensive plan to regulate and supervise certain common carriers by water. In order to determine the legal effect of Section 27, the whole Act, of which that section is a part, must be read.

The Merchant Marine Act and the Act to Regulate Commerce, each in its own field, are designed to regulate two classes of common carriers. This was settled by this Honorable Court in *U. S. Navigation Company* v. *Cunard S. S.*, 284 U. S. 474, where Mr. Justice Sutherland said, in part, at pages 480-481:

> "The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. * * * In its general scope and purpose, as well as in its terms, that Act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two Acts, each in its own field, should have like interpretation, application and effect."

A comparison of the certain provisions of the Shipping Act as amended by the Merchant Marine Act and the Act to Regulate Commerce shows conclusively that each Act is intended to be supreme in its own field.

Merchant Marine Act.	*Act to Regulate Commerce.*
Sections 16 and 17 of the Shipping Act (46 U. S. Code, pars. 815 and 816) prohibit discriminatory acts and rates by common carriers to their shippers.	Sections 2 and 3 (49 U. S. Code, pars. 2 and 3) prohibit discriminatory acts and rates by common carriers to their shippers.

Section 18 of the Shipping Act (46 U. S. Code, par. 817) requires carriers to file reasonable maximum rates with the Board, and charge only such rates for service as are filed, unless the Board shall otherwise direct.	Sections 1 and 6 (49 U. S. Code. pars. 1 and 6) provide, among other things, that the carriers must file tariffs showing their charges for services which must be reasonable, and must not be departed from except upon notice to the Commission.
Section 20 of the Shipping Act (46 U. S. Code, par. 819) prohibits the disclosure by the carrier of confidential information injurious to a shipper without his consent.	Section 15, paragraph 11 (49 U. S. Code, par. 15 (11)), prohibits the disclosure by the carrier of confidential information injurious to a shipper without his consent.
Section 21 of the Shipping Act (46 U. S. Code, par. 820) requires the filing of such reports by the carrier as the Board may prescribe and provides penalties for failure to file and for false statements.	Section 20 (49 U. S. Code 20) requires the filing of an annual report by the carrier in such form as the Commission may direct and provides penalties for failure to file and for false statements.
Section 15 of the Shipping Act (46 U. S. Code, par. 814) provides that traffic contracts between carriers subject to the Act shall be filed with the Board.	Section 6, par. 5 (49 U. S. Code, par. 6 (5)), provides that all traffic contracts between two carriers subject to the Act shall be filed with the Commission.
Section 22 of the Shipping Act (46 U. S. Code, par. 821) provides for complaints against carriers for violations of the Act and for the award of reparation by the Board if damage is proved.	Section 9 (49 U. S. Code, par. 9) provides that any one injured by violations of the Act by a carrier may file complaint for reparation with the Commission or bring suit in the United States Court, at his election.
Sections 27 and 28 of the Shipping Act (46 U. S. Code, pars. 827 and 828) provide for the production of books and papers, the attendance of witnesses before the Board, and the immunity of witnesses.	Section 12 (49 U. S. Code, par. 12) provides for the production of books and papers, and the attendance of witnesses before the Commission. Section 1 (49 U. S. Code, par. 47) provides for the immunity of witnesses.

Section 3 of the Shipping Act (46 U. S. Code, par. 804) creates the United States Shipping Board and gives it its general grant of jurisdiction over the matters within the Merchant Marine Act.

Section 11 (49 U. S. Code, par. 11) creates the Interstate Commerce Commission and gives it its general grant of jurisdiction over the matters within the Act to Regulate Commerce.

From the above comparison, it will be seen that the Congress has set up two independent systems of regulation of different kinds of carriers. The Shipping Act and the Merchant Act have the exclusive regulation of one class and the Interstate Commerce Act has the exclusive regulation of the other. As was tersely stated by this Court in *U. S. Navigation Co.* v. *Cunard S. S. Co.* (*Supra*), Congress intended that the two jurisdictions should be complete and exclusive, "each in its own field".

Section 27 is but a part of the Shipping Act as amended by the Merchant Marine Act. If Section 27 applies to this petitioner, the whole Act, of which it is a part, applies to this petitioner. The result of such a construction is a duplication of regulation over this petitioner, a divided allegiance by this petitioner, hopeless chaos in a field of regulation where order is essential.

Fortunately, this Court has seen the difficulties presented by this claim of the United States and has decided which carriers are to be governed by which Act.

In *Chicago, R. I. Ry.* v. *U. S.*, 274 U. S. 29, this Court held that where a water line is in common management and control with an interstate railroad, the water line is within the exclusive jurisdiction of the Interstate Commerce Act.

In *U. S.* v. *Munson S. S. Line*, 283 U. S. 43, this Court held that when the water line is wholly divorced from a railroad, the water line is within the exclusive jurisdiction of the Merchant Marine Act.

It must follow, therefore, that because this petitioner is a water line in common management and control with a railroad, this petitioner is within the exclusive coverage of the Interstate Commerce Act. The Merchant Marine Act, Section 27 included, has no application to this petitioner under the decisions of this Court.

POINT D.

The proviso of Section 27 exempts the transportation of property between New England points and New York City.

The proviso in Section 27 (U. S. Code, par. 883) exempts the transportation of merchandise over through routes when such routes "are in part over Canadian rail lines" with other requirements which have admittedly been complied with. The claim of your petitioner is that the transportation of property between New England points and New York is made over a "Canadian rail line" with its "connecting water facilities" within the meaning of this statute.

Your petitioner is a Maine corporation whose stock is owned by Central Vermont Railway, Inc., which is a Vermont corporation. The stock of this last named corporation is owned by Canadian National Railway Company, a Canadian corporation.

The argument of the United States is that neither your petitioner nor its parent, Central Vermont Railway, Inc., can qualify under Section 2 of the Shipping Act (46 U. S. Code, par. 802), as a citizen of the United States because of the ownership of the stock of the latter by Canadian National Railway Company. Let us assume that this argument is sound. Let us assume that under this statute a corporation takes the citizenship of its stockholders and not its State of organization.

It is too late to argue that a corporation is not a "person".

McGaskill Co. v. *U. S.*, 216 U. S. 504.
Donnell v. *Herring-Hall, etc. Co.*, 208 U. S. 267.

As a person, a corporation, if it lawfully exists, must have a domicile and a nationality.

Shaw v. *Quincy etc. Co.*, 145 U. S. 444.
In Re Keasbey, 160 U. S. 221.
Galveston, etc. Ry. Co. v. *Gonzales*, 151 U. S. 496.

Under ordinary rules, your petitioner, incorporated in Maine, would be domiciled there and a citizen of that State. Petitioner's parent company, incorporated in Vermont, would be domiciled there and a citizen of that State. But, it is claimed, under Section 2 of the Shipping Act a corporation takes the domicile and citizenship of its stockholders and not its State of incorporation.

Giving this argument its full force, it proves that Central Vermont Railway, Inc. is a citizen of and domiciled in Canada because its stock is owned there. If Central Vermonth Railway is a citizen of Canada, as is asserted by the Government, within the meaning of this law, it is a "Canadian rail line" within the meaning of that same law. If this last is true, merchandise moving over Central Vermont Railway from New England points is moving "over a Canadian rail line" within the meaning of the proviso in Section 27, and is exempt from the operation of that section.

Point E.

Section 27 of the Merchant Marine Act, as construed by the United States, violates the rights of this petitioner guaranteed by the Fifth Amendment to the Constitution of the United States.

The undisputed facts show: that your petitioner was incorporated under the laws of Maine in 1908 and became an American citizen under any law which existed at that

time. Petitioner's stock at that time was acquired by Central Vermont Railway Company, whose stock was then owned by Grand Trunk Railway Company of Canada. Petitioner legally acquired the boats "New London" and "New York" and commenced operation of them as a part of Central Vermont Railway Company property in 1909. All this was lawful at the time and petitioner was an American citizen entitled to the guaranties provided by law. The boats, it is undisputed, were and are suitable only for operation on a protected waterway like Long Island Sound and were designed for operation in connection with a railroad. The result is that petitioner, as an American citizen, made its investment for this particular operation in strict conformity with the laws of the United States.

The Shipping Act of 1916 and the Merchant Marine Act of 1920, if given the construction advocated by the Government, deprive petitioner of its citizenship and deprive petitioner of a substantial use of its property. Whereas petitioner was a citizen of the United States prior to those Acts, it is no longer such under the definition of the word "citizen" in those Acts. Those two Acts, it is contended, prohibit the carriage of certain railroad freight amounting to a total of 33 per cent of petitioner's tonnage. Such a Legislative Act is not regulation, but deprivation of property.

It is admitted by your petitioner that its property is subject to reasonable regulation. But this Honorable Court, long ago, settled the proposition that regulation of public utilities cannot go beyond the reasonable bounds.

> "As the public power to regulate railways and the private ownership of such property co-exist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guaranties, and, therefore, whenever the power of regula-

> tion is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment."
>
> *Atlantic Coast Line* v. *North Carolina Corp. Commission,* 206 U. S., 1 at 20.

Similar arbitrary action by the Federal Government would violate the Fifth Amendment.

Hibben v. *Smith,* 191 U. S. 325.

French v. *Barber,* 151 U. S. 329.

The Constitutional guaranties are not limited to a taking of title by the Federal Government, but prohibit a deprivation of the use of property.

> "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title."
>
> *Chicago, R. I. & P. Ry.* v. *U. S.,* 284 U. S., 80 at 96.

When your petitioner made its investment, your petitioner was an American citizen under the laws of that country. Your petitioner acquired valuable property suitable only for operation on Long Island Sound or some other protected waterway. Your petitioner thereby consented to future regulation of it and its property, but it did not consent, nor could it foresee, that the Congress would assume to deprive your petitioner of its American citizenship and deprive it of the only possible use of its property. The construction of Section 27 claimed by the United States is that a statute may be passed by Congress depriving an American citizen of his citizenship and prohibiting that citizen from using his property in a lawful business. Such attempts against the person and the prop-

erty are so shocking that they must be within the prohibitions of the Fifth Amendment. Your petitioner in 1909, when its money was invested, could foresee and consented to future regulation, but no amount of prediction could envisage that your petitioner would be stripped of its citizenship, without fault on its part, and prohibited from engaging in the lawful business of transportation.

This is not one of the cases where the whole business becomes illegal. When the people ostracize an entire industry, the operator in that trade suffers no recoverable loss.

Everard Breweries, 265 U. S. 545.
Ruppert v. *Caffey*, 251 U. S. 264.
Mugler v. *Kansas*, 123 U. S. 623.

In this case, the business involved is transportation which is a lawful business. Your petitioner has been excluded from that business which is of unquestioned legality today.

Courts must be alert to see through any attempts to deprive American citizens of their guaranteed rights. No matter how noble may be the motive, no matter how desirable may be the result, if the attempted Congressional action is prohibited, it must fail. The Congress, even though acting under the guise of Constitutional authority, cannot do an act prohibited by that document.

Schollenberger v. *Penn.*, 171 U. S. 1.

This Honorable Court has had occasion to point out the limits of Constitutional action by the Congress, and has said:

> "It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of property of public utility companies, and is not clothed with general power of management incident to ownership."
>
> *So. Bell Co.* v. *Public Service Commission*, 262 U. S. 276, at 288.

This Honorable Court has declared invalid various attempts by the States to push regulation beyond reasonable bounds. Thus a law which attempted to keep upper berths on a Pullman car closed until sold when the lower berth was occupied, was declared an unconstitutional invasion of property.

Chicago, M. & St. P. R. R. v. *Wisconsin*, 238 U. S. 491.

Again, when a carrier had held itself out to be a carrier of passengers only, it could not be compelled to carry freight.

Northern Pacific Ry. v. *North Dakota*, 236 U. S. 585, 595.

This led the Court in *Oregon* v. *U. S.*, 47 F. (2) 250 to hold that a railroad cannot be compelled to extend the use of its property beyond the scope of that originally assumed. If it be unlawful to require a carrier to enlarge its activities, it must be equally prohibited to require a carrier to curtail one-third of its activity when ruin to the carrier will result. The carrier, to survive, must have the fullest use of its alloted corporate franchise, subject to reasonable regulation. But to deprive a carrier of one-third of the use of its franchise and investment goes beyond anything ever attempted by Congress or authorized by this Honorable Court.

The Government has been denied the right to interfere with the elimination of unprofitable trains because of the invasion of the use of the carrier's property.

Miss. R. R. Comm. v. *M. and C. R. R.*, 244 U. S. 388.

Your petitioner's position, when stripped of its citizenship and one-third of its business is much more pathetic than that of the carrier which this Honorable Court protected in the cited case.

The Constitution protects the carrier against the imposition of unreasonably low rates.

So. Bell Co. v. *Public Service Commission*, 262 U. S. 276.

Denver, etc., v. *U. S.*, 57 F. (2) 735.

It must be that if your petitioner is protected in that respect, it is also protected against the seizure by the Congress of one-third of all its traffic.

In the cases reviewed, a substantial interference with the business of the carrier is shown. But in no case is the result of the Congressional interference so grave as in your petitioner's case. The attempted Congressional action in your petitioner's case is much more disastrous than any of the prohibited acts in the cases cited. If Section 27, as construed by the United States, receives judicial sanction, your petitioner must perish.

Mr. Justice Bradley said in *Boyd* v. *United States*, 116 U. S. 616, at 635:

> "It is the duty of courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachments thereon."

Your petitioner has the faith to believe and the courage respectfully to argue that this Honorable Court will not permit the Congress to deprive your petitioner of its American citizenship, confiscate one-third of its corporate business, and thus pronounce your petitioner's death sentence.

It follows, therefore, that the Circuit Court of Appeals for the Second Circuit erred, and it is respectfully submitted that this case is one calling for the exercise by this

Court of its supervisory powers to such end that a writ of certiorari should be granted, and that this Court should review the decision of the Circuit Court of Appeals.

HORACE H. POWERS,
Counsel.

St. Albans, Vermont.

(5249-C)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY,

Petitioner,

against

HARRY M. DURNING, COLLECTOR OF CUSTOMS THE PORT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

Summary of Reply Argument.

1.

The Government is in error in its assertion that petitioner's argument for exemption from Section 27 of the Merchant Marine Act will permit foreign water carriers to engage in the coastwise trade.

2.

The Government is in error in its assertion that, even though petitioner is under the control of the Interstate

Commerce Commission, petitioner is also controlled by Section 27 of the Merchant Marine Act.

3.

The Government is in error in its assertion that if there has been an unconstitutional invasion of petitioner's rights, the remedy is a sale of its property by petitioner or a sale of petitioner's stock by the parent company.

Argument.

1.

Beginning on page ten of its brief, the Government asserts that if petitioner's argument in respect of the existing proviso of Section 27 of the Merchant Marine Act is sound, it proves that any foreign water carrier can evade the section by filing joint water and rail tariffs with some railroad in the United States and become a part of a "through route * * * recognized by the Interstate Commerce Commission * * *." Thus, concludes the Government, the ancient policy of preserving the coastwise trade to American shipping is frustrated. Petitioner's argument does not admit the Government's conclusion.

In the first place, the "recognition" required of the Interstate Commerce Commission is something more than the receipt of a tariff by that tribunal. The filing of rate tariffs is required by the Act to Regulate Commerce for the sole purpose of giving publicity to the transportation charges of a common carrier subject to the Act. This mandatory act of the carrier has no other significance than to inform the Commission and the public of the current rates of the carrier. Attempts have been made at various times to make the filing of rate tariffs mean something of significance, but the Commission from an early date has

held that the receipt of such tariffs imparts no recognition by it of the contents of such tariff.

San Bernardino vs. *A. T. & S. F. R. R.*, 3 I. C. C. 138.

The proviso itself of Section 27 carries the double condition that there must be a recognition by the Commission of the route involved and the filing of rate tariffs. This shows clearly that the Congress intended that in addition to the filing of rate tariffs, there must be a recognition of the route, which would be something more than the filing of tariffs.

In *Rail Lake and Rail Rates*, 96 I. C. C. 633, cited on page 10 of the Government's Brief, there is nothing contrary to all this. The majority opinion leaves open the question of what constitutes recognition of these routes under Section 27. The minority opinion, which includes Commissioners Eastman, McManany and Aitchison, states forcibly that (page 642)—

> "In my opinion, Section 27 (of the Merchant Marine Act) requires some affirmative action on our part."

It must be clear, therefore, that the recognition of these routes by the Commission means some affirmative action by it rather than the innocuous act of receiving rate tariffs.

Secondly, if a foreign water carrier seeks to participate in commerce subject to the jurisdiction of the Interstate Commerce Commission, the carrier must do much more under the Act than file tariffs. Such a carrier must get authority to operate under paragraphs 18 to 21 of Section 1 of the Act to Regulate Commerce. A water carrier, operating under the jurisdiction of the Commission, must have authority under Section 20a for its issue of securities. A water carrier under the Commission's jurisdiction, if connected by stock ownership directly or indirectly with

a rail carrier, must run the gamut of the Panama Canal Act (paragraphs 19 to 21 of Section 5, as renumbered) and the other provisions of Section 5 as amended.

It will thus be seen that ample protection is given the public through the medium of the Interstate Commerce Commission against any invasion of any field which our National policy has reserved for any favored group.

In the third place, the danger which the Government fears is the pollution of coastwise shipping. There is no coastwise traffic involved in this case. The Record shows that this petitioner handles no port-to-port business. The only merchandise transported in petitioner's boats is railroad freight—traffic moving on rail and water bills of lading, destined to or received from inland railroad points. Such traffic is not coastwise in character even though it moves, as a part of its journey, between coastwise points.

It is well settled by this Honorable Court that the character of transportation is determined by reference to its origin and ultimate destination, regardless of the fact that it may move between local points in transit.

U. S. vs. *Union Stock Yard,* 226 U. S. 286;
R. R. Commission vs. *T. & P. Ry. Co.,* 229 U. S. 336;
T. & N. O. R. R. vs. *Sabine,* 227 U. S. 111;
Coe vs. *Errol,* 116 U. S. 517.

It usually happens that interstate commerce moves, as a part of its journey, between two local points. But this Honorable Court has continuously labeled such commerce interstate in character even though such traffic while in transit moves between local points. So in the case at bar, the traffic moves between two ports, but such movement is but part of a rail and water transportation. The merchandise is received from or destined to inland non-coastal points, and under the well-settled doctrine above recited is not coastwise traffic.

Petitioner's argument in this regard is fortified by the few existing decisions, defining the term "coastwise trade" or "coasting trade."

In *Gibbons* vs. *Ogden*, 2 Cranch (6 U. S.), 1, Chief Justice Marshall assumes that the coasting trade means local port-to-port business between points on the navigable waters.

In *Steamboat Company* vs. *Livingston*, 3 Cowen (N. Y.) 747, the court says that by "coasting trade" is meant

> "commercial intercourse carried on between different districts in different States, between different districts in the same State, and between different places in the same district, on the sea coast or on a navigable river."

To the same effect is *Ravesies* vs. *U. S.*, 37 Fed. 447.

In the fourth place, the routes to be exempt must be in part over Canadian rail lines. It is a matter of common knowledge that there are but two Canadian rail systems, one of which is involved in this case. It is well known that these Canadian railroads have but few entrances into the United States. Because the Act to Regulate Commerce requires such matters to be publicly recorded with the Interstate Commerce Commission, this Honorable Court is aware that these Canadian railroads have found their United States rail connections through subsidiary companies or leased lines.

It is therefore respectfully submitted that petitioner's argument regarding the effect of the proviso in Section 27 of the Merchant Marine Act does not imperil any National policy in respect of coastwise shipping.

2.

Beginning on page 13 of its brief, the Government argues that even though petitioner is within the control of the

Interstate Commerce Commission, petitioner is also within the scope of Section 27 because (1) Section 27 deals with something different from anything administered by the Commission, and (2) the reference in the proviso of Section 27 to the filing of rate tariffs with the Interstate Commerce Commission shows that carriers subject to the control of that tribunal were included within the scope of the section.

Beginning on page 15 of Petitioner's Brief, it is shown that Section 27 is but a part of a comprehensive statute to regulate certain carriers by water. From a comparison of the Merchant Marine Act and the Act to Regulate Commerce, it is clear that in the two statutes, the jurisdictions are complete and separate. This Honorable Court has so held in *U. S. Navigation Co.* vs. *Cunard S. S. Company*, 284 U. S. 474.

Section 27 of the Merchant Marine Act is a restraint upon the ownership of boats operating in the service named and the ownership of stock of the company owning such boats. Both of these matters, in the case of this petitioner, come under the exclusive jurisdiction of the Interstate Commerce Commission and have been determined by that Commission. Consequently, under Section 33 of the Shipping Act, Section 27 of the Merchant Marine Act does not apply to this petitioner. This, it is submitted, shows the error in the argument that Section 27 deals with a subject matter different from that administered by the Interstate Commerce Commission.

The requirement in the proviso of Section 27 that rate tariffs must be filed with the Interstate Commerce Commission proves nothing about the scope of Section 27. As is shown on page 17 of Petitioner's Brief, it is clear that under the decisions of this Honorable Court, there are two types of water carriers operating in the service contem-

plated by Section 27—(1) water lines in common management and control with a railroad and (2) water lines unconnected by ownership with any railroad. The former are under the exclusive jurisdiction of the Interstate Commerce Commission (*Chicago, R. I. Ry.* vs. *U. S.*, 274 U. S. 29), and must file tariffs with that tribunal, but the latter water lines are under the exclusive jurisdiction of the Merchant Marine Act (*U. S.* vs. *Munson S. S. Line*, 283 U. S. 43), and file no tariffs with the Interstate Commerce Commission. The requirement of filing tariffs by all carriers for this rail and water service with the Interstate Commerce Commission, thus putting both classes of water carriers on a parity, obviously has nothing to do with the intended scope of Section 27.

3.

On page 18 of its brief, the Government argues, in answer to the charge that Section 27 invades the constitutional rights of the petitioner, that the petitioner may sell its property or that petitioner's parent company may be prevailed upon to sell petitioner's stock, and thus avoid the claimed confiscation.

Such an argument seems clearly erroneous. It cannot be that if a citizen's liberty or his property rights have been illegally invaded the citizen is required to dispose of his person or sell his property in order to avoid the wrong done to him. If the Constitution is to protect liberty and property, it must guarantee those possessions against involuntary sacrifice. It is always true that a citizen may dispose of property illegally confiscated and commit suicide when his liberties are invaded, but it is no justification for the original wrong done by the Government.

In all of the cases cited on page 23 of Petitioner's Brief, the railroads whose rights were held to have been con-

fiscated might have sold off their property and been free of the unlawful results found to exist. In the cited cases and in the case at bar, it can be no answer that the owner of confiscated property must go out of business to escape the unconstitutional action. This Honorable Court has never held that the owner of protected rights must dispose of those rights or suffer the consequences of unconstitutional Congressional action.

If, as petitioner argues, Section 27, as applied to this petitioner, invades guaranteed rights, the statute and not petitioner must yield. It is respectfully submitted that this petitioner is not required to dispose of its property if that property has been violated by an enactment of the Congress.

Conclusion.

It is respectfully submitted that the judgment of the Court below should be reversed.

HORACE H. POWERS,
Counsel for Petitioner.

ST. ALBANS, VERMONT, *November* 21, 1934.

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY, petitioner

v.

HARRY N. DURNING, COLLECTOR OF CUSTOMS, PORT OF New York

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The decision of the court below involves the interpretation of Section 27 of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 999 (U.S.C., Title 46, Sec. 883), which section has never been construed by this Court. It appears that the question involved is of considerable importance, not only to the petitioner but to shippers in the territory which it serves. We understand, also, that at least one other railroad company is in the same position as the petitioner with respect to Section 27, *supra.*

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While we regard the decision of the court below as correct, we believe that the question is of sufficient importance to call for an authoritative decision on the part of this Court. Consequently, we do not oppose the granting of the writ.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

AUGUST 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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In the Supreme Court of the United States

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No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY,
Petitioner,

v.

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Port of New York

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 14–18) is not reported. The opinion of the Circuit Court of Appeals (R. 23–31) is reported in 71 F. (2d) 273.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 18, 1934 (R. 31). The petition for writ of certiorari was filed August 2, 1934, and was granted on October 8, 1934 (R. 33). The jurisdiction of this Court rests upon Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the proviso contained in Section 27 of the Merchant Marine Act of 1920 exempts from seizure merchandise originating in Vermont and carried over rail lines to New London, Connecticut, thence transshipped to New York City on a vessel belonging to the petitioner.

2. Whether Section 27 of the Merchant Marine Act, if applicable to the petitioner, violates the Fifth Amendment to the Constitution.

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra,* pp. 20–22.

STATEMENT

The cause was submitted to the District Court on a bill of complaint and a motion to dismiss the bill, each pleading being supported by an affidavit (R. 2–13). The facts so appearing are substantially as follows:

The petitioner was incorporated under the laws of Maine in the year 1908, and its stock, with the exception of certain directors' qualifying shares, was owned by the Central Vermont Railway Company, a corporation organized under the laws of Vermont (R. 2, 3, 7). The stock of the latter company was owned by the Grand Trunk Railway Company, a Canadian corporation (R. 3). In the

following year the petitioner purchased two vessels built in the United States and documented under the laws of the United States, and continuously since that date has operated them between New London, Connecticut, and New York City (R. 3). Subsequently, the Canadian National Railway Company, a Canadian corporation, acquired all the stock of the Grand Trunk Railway Company (R. 3, 8). The Central Vermont Railway, Inc., acquired the property of the Central Vermont Railway Company, and the Canadian National Railway Company acquired all the stock, except the directors' qualifying shares, of the Central Vermont Railway, Inc. (R. 8).

The petitioner and the Central Vermont Railway, Inc., are engaged in the transportation of property, partly by rail and partly by water, under common control, for a continuous carriage between points in the States of Connecticut, Massachusetts, and Vermont and New York City (R. 3, 10). It also transports merchandise originating at points in the western States of the United States, which is routed over Canadian rail lines, and thence over the Central Vermont Railway, Inc., and its connecting water carrier, the petitioner (R. 4, 10). The Interstate Commerce Commission has approved certain through routes with corresponding rates therefor (R. 4), the operation of the boats by the petitioner (R. 5), the ownership of the stock of the petitioner by the Central Vermont Railway,

Inc., and the ownership of the stock of the Central Vermont Railway, Inc., by the Canadian National Railway Company (R. 4, 5, 9).

The respondent seized certain merchandise transported by the petitioner for the purpose of forfeiting the same (R. 5–6). This merchandise had originated at St. Albans, Vermont, thence proceeded over the line of the Central Vermont Railway, Inc., to New London, Connecticut, where it was placed upon one of the boats of the petitioner, and thence was transported by water to New York City (R. 5–6). The petitioner thereupon instituted a suit in the United States District Court for the Southern District of New York asking for a return of the merchandise, and that an injunction be granted enjoining the respondent from seizing any other merchandise which it so brought to New York City (R. 2, 6, 11). The merchandise was seized by the Collector of Customs under authority of Section 27 of the Merchant Marine Act of June 5, 1920 (R. 12, 15).

The District Court denied the respondent's motion to dismiss the bill and granted a temporary injunction restraining the respondent from making any further seizures of the petitioner's freight during the pendency of the suit (R. 17, 19). On appeal the United States Circuit Court of Appeals for the Second Circuit reversed the decision of the District Court (R. 45).

SUMMARY OF ARGUMENT

I

Section 27 of the Merchant Marine Act of 1920 prohibits, under penalty of forfeiture, transportation of merchandise between ports of the United States in a vessel other than one owned by a citizen of the United States. Under the provisions of Section 38 of the Act the petitioner is not a citizen of the United States. Merchandise transported by the petitioner, therefore, between ports of the United States is subject to forfeiture, unless the petitioner comes within the proviso in Section 27 of the Act, or unless the Act does not apply to the petitioner.

A proviso in Section 27 exempts from the operation of the Act merchandise which has been transported between points within the continental United States over through routes recognized by the Interstate Commerce Commission, for which routes rate tariffs have been filed with the Commission, when such routes are in part over Canadian rail lines and their own or other connecting water facilities. The merchandise involved in the instant case was transported between St. Albans, Vermont, and New York City, and did not pass over a Canadian rail line. Ownership of the stock of the rail line by a Canadian citizen does not make the line a "Canadian rail line" within the meaning of the statute. The route from St. Albans to New York

City was not a part of a through route over Canadian rails. Different routes can pass over the same rails. The history of the Merchant Marine Act confirms this interpretation, especially as a proviso is to be strictly construed. The petitioner in the instant case does not come within the proviso.

Section 27 applies to the petitioner, notwithstanding the fact that it is subject to regulation by the Interstate Commerce Commission. If the fact were otherwise, there would have been no necessity for including the proviso in Section 27, as the fact that the petitioner was under the control of the Interstate Commerce Commission automatically would have exempted it. There is no departmental interpretation to the contrary.

II

Section 27 of the Act does not violate the Fifth Amendment to the Constitution. It is a restatement in more strict terms of an old, settled policy of the United States which reserved to its own citizens the privilege of engaging in the coastwise trade. The petitioner has not been deprived of any property, and the statute itself constitutes a prohibition of a nature which the United States has a right to impose. More stringent regulations than this have been upheld by this Court. There is no error, and the judgment of the court below should be affirmed.

ARGUMENT

I

The Merchant Marine Act of 1920 provides that, within the meaning of the Act, no corporation shall be deemed to be a citizen of the United States unless seventy-five percent of the stock thereof is owned by citizens of the United States, and that such stock shall not be deemed to be owned by citizens of the United States if the title is not vested in such citizens free from trust or fiduciary obligation in favor of any person not a citizen of the United States (Section 38, *infra,* p. 21). It is admitted that the stock of the petitioner is not so owned (R. 4 and 5), the beneficial ownership being vested in the Canadian National Railway Company, a Canadian national, and that therefore the petitioner is not a citizen of the United States as defined by the Act. The operative part of Section 27 of the Act, *infra,* p. 20, provides that no merchandise, under penalty of forfeiture thereof, shall be transported by water or by land and water in any vessel other than one built in and documented under the laws of the United States and owned by persons who are citizens of the United States. The section also contains a proviso excepting in certain circumstances the application of the Act. It is clear, therefore, the petitioner not being a citizen of the United States, that Section 27 of the Merchant Marine Act authorized the action of the respondent, unless the

petitioner came within the proviso of that section or unless the statute did not apply to it.

The proviso itself exempts from the penalty of Section 27 merchandise transported between points within the continental United States over through routes recognized by the Interstate Commerce Commission, for which routes rate tariffs have been, or shall be, filed with said Commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities.

Approximately two-thirds of the freight carried by the petitioner admittedly comes within this proviso, and it is not subject to forfeiture, the freight in fact having passed over Canadian rail lines. The remaining one-third, which originates at points within New England for carriage to New York, or which originates in New York City for carriage to points within New England, constitutes the type of carriage by the petitioner which the court below found to fall outside the proviso and to be subject, therefore, to the operative part of Section 27.

The merchandise which was seized by the respondent originated in St. Albans, Vermont, traveled over the lines of the Central Vermont Railway, Inc., to New London, Connecticut, where it was transshipped to a boat of the petitioner, and thence carried to New York City. It never passed over any Canadian rail line, notwithstanding an argument of the petitioner to the contrary.

The petitioner contends, since under the provisions of the Merchant Marine Act no corporation constitutes an American national unless seventy-five percent of the stock of the corporation is beneficially owned by American citizens, that the Central Vermont Railway, Inc., is a Canadian corporation, the beneficial ownership being located in Canada. From this premise the petitioner concludes that the Central Vermont Railway, Inc., was a Canadian rail line, and that inasmuch as a part of the route traversed by the merchandise in question had been over the lines of that railway, it had in effect been over Canadian rail lines. It is obvious from a reading of the proviso that the word "Canadian" as applied to rail lines was used in a geographical and not in a political sense. Nor does it appear that the Central Vermont Railway, Inc., necessarily was a Canadian corporation. The United States might, for the purpose of the Act, divest such a corporation of its American nationality. It does not follow, however, that the corporation would acquire any other nationality. Whether in these circumstances the railway has acquired Canadian citizenship depends upon the laws of Canada. Foreign laws must be proved as a matter of fact, and no such proof has been offered in this case. That question, therefore, is not before this Court.

The petitioner also asserts that in order to come within the proviso it was not necessary that the

merchandise actually pass over a Canadian rail line, but only that the lines over which it passed should constitute a part of the through route recognized by the Interstate Commerce Commission and for which rate tariffs have been filed. This argument proves too much. If it were held to be correct, the petitioner would be at liberty to transport merchandise of any nature between New London, Connecticut, and New York City, inasmuch as it, being a part of the through route, would be exempt from the necessity of having the merchandise in question move over Canadian rails. It is particularly important to note that the Interstate Commerce Commission has failed to determine what constitutes a recognition on its part of a through route within the meaning of the proviso. In *Rail Lake and Rail Rates Between U. S. Points via Canadian Lines,* 96 I. C. C. 633, the Commission stated that it was in doubt as to what action on its part constituted recognition, and suggested that the filing with it of through rate tariffs might in itself constitute such recognition. It further stated that if some other type of recognition were required, the statute failed to point out the form that such recognition should take. In these circumstances merchandise originating at any point in New England on this, or some other through route, could be transshipped in foreign vessels to any port in the United States, including, of course, the Pacific Coast, by the simple expedient of filing with the Interstate Commerce Commission rate tariffs

to the desired port. In this manner the plain intent of Congress to reserve to its own citizens the field of coastwise shipping would be defeated.

An analysis of the language of the proviso, however, discloses no such meaning as that advanced by the petitioner. The proviso excepts "merchandise transported * * * over through routes * * * when such routes are in part over Canadian rail lines and their own or other connecting water facilities."

The statute does not state that it exempts merchandise transported over any part of the route any other part of which is over a Canadian rail line and connecting water carrier. The plain language of the statute indicates that part of the transportation must be in fact over Canadian rail lines. A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. *Matter of Through Routes and Through Rates,* 12 I. C. C. 163, 166. The same rail lines may frequently be used by different through routes. For example, freight moving into the District of Columbia and originating at a point in New England might traverse the same rail lines as freight originating in Pittsburgh or Chicago, yet it could not be stated that this freight moved over a part of the through route from either Chicago or Pittsburgh to the District of Columbia. The merchandise in the case at bar did not move over a through route over Canadian rail lines. The through route over which it moved commenced at

St. Albans, Vermont, and while traversing the same rails as those traversed in part by the through route over Canadian rails, it constituted a separate and distinct through route and not one of the type described in the proviso.

The history of Section 27 of the Merchant Marine Act confirms this interpretation. It was not a part of the bill when it was introduced in the House of Representatives, nor when it was passed by that body, but, after the bill had reached the Senate, Section 27 was offered as an amendment to the bill, and as passed by the Senate it contained substantially the operative part of Section 27 without any proviso. It was placed in the bill for the purpose of guarding against evasions possible under existing law, and reference was made to 30 Op. Atty. Gen. 3. Congressional Record, Vol. 59, pp. 7348–7350, 6811. The bill, after its adoption by the Senate, went to conference, where it was further amended in conference by inserting the proviso. H. Repts. Nos. 1093, 1102, 1107, 66th Cong., 2d sess.; Cong. Rec., Vol. 59, pp. 8167, 8401, 8592–3. The obvious purpose of the proviso was to permit transportation by water where the merchandise had in fact passed over Canadian rails.

A proviso, as stated by this Court, has the effect of exempting something from the operative effect of the substantive enactment to which it is attached. *Minis* v. *United States,* 15 Pet. 423; *Cox* v. *Hart,* 260 U. S. 427, 435. A proviso is to be strictly construed. It takes no case out of the enacting clause,

unless that case falls fairly within the terms of the proviso, and those who set up such exception must establish it as being within the words as well as the reason thereof. *United States* v. *Dickson,* 15 Pet. 141, 165; *Ryan* v. *Carter,* 93 U. S. 78, 83; *Schlemmer* v. *Buffalo, Rochester, &c. Ry.,* 205 U. S. 1, 10. The argument of the petitioner in this case fails to meet the requirements so laid down. Conversely, we submit, a fair reading of the proviso in question indicates that merchandise, to be exempt from the provisions of Section 27 of the Merchant Marine Act, must have passed over a Canadian rail line.

The petitioner finally contends that it was under the control of the Interstate Commerce Commission, which approved the routes and accepted rate tariffs therefor, and that the statute does not apply to it. The argument appears to be substantially as follows: The petitioner cannot be both subject to the Interstate Commerce Commission, and also to the Commerce Department, which latter has charge of the administration of the Merchant Marine Act; that, being subject to the Interstate Commerce Commission, nothing in the Merchant Marine Act applies to it; or, at the most, that if any part of the Act applies to it, that part should be enforced by the Interstate Commerce Commission, and the Interstate Commerce Commission, having approved of its operation, must be held to have interpreted the law as not applying to the petitioner.

This argument on the part of the petitioner, we submit, is based on several misconceptions. The

Interstate Commerce Commission has certain jurisdiction conferred upon it by law. As far as the record discloses, that jurisdiction found expression solely in the acceptance of rate tariffs and the approval of the ownership of the petitioner's stock by the Central Vermont Railway, Inc. It may well be that the Department of Commerce could not regulate the petitioner's rate, or interfere with the field within which the Interstate Commerce Commission has jurisdiction, but this of itself would not preclude the Department of Commerce from having jurisdiction of the enforcement of Section 27. Nor would the fact that the Interstate Commerce Commission had exclusive jurisdiction over the petitioner preclude the application of Section 27 of the Act. This Court has frequently held that notwithstanding such exclusive control, a different statute dealing with the same subject matter is applicable. *Texas & Pacific Railway* v. *Interstate Commerce Commission,* 162 U. S. 197, 221; *United States* v. *Freight Association,* 166 U. S. 290.

It is likewise apparent that the statute was intended to apply to carriers situated as is the petitioner. The proviso refers specifically to carriers whose rate tariffs have been approved by the Interstate Commerce Commission. Had the mere fact that such carriers were subject to some degree of control by the Interstate Commerce Commission been sufficient to exempt them from the operation of the statute, there would have been no necessity

for the addition of the proviso. The law is well settled that a statute must be construed so as to give effect to every provision thereof. *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 66; *Peck* v. *Jenness*, 7 How. 612, 622. It is apparent, therefore, that the petitioner is subject to the provisions of the statute.

The duty of administering the Merchant Marine Act has been placed in the Department of Commerce, and Section 27 is an integral part of that Act. Conversely, the Interstate Commerce Commission has denied that it has any concern with the enforcement of that section. *Rail Lake and Rail Rates, Etc.*, 96 I. C. C. 633, *supra*; 37 Op. Atty. Gen. 50. Nor does it appear to be of importance which body had jurisdiction. It was the duty of the appropriate governmental agency to enforce the statute according to its letter; and had either decided that the act of the petitioner in transporting freight originating in the United States constituted no violation of the statute when that freight had not passed over a Canadian rail line, such decision would have constituted no defense in an appropriate action to enforce the penalty. Whether Section 27 of the Merchant Marine Act applies to the petitioner is a question of law to be determined by the courts and not by the Interstate Commerce Commission, which has no power to decide questions of law. It is at the most an administrative body with certain quasi-judicial functions, but it is in no sense a judicial body. *United States* v. *New*

York Central R. R., 263 U. S. 603; *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658; *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U. S. 452, 470; *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433.

The petitioner states that it had been engaged in such transportation for over twelve years when the instant case was commenced, and that the Department of Commerce had been aware both of this and the fact that the Canadian National Railway was the beneficial owner of its stock. We see no necessity to consider any inference which might be drawn from this recital of facts, for the reason that the Department of Commerce did not become aware of the alien ownership of the petitioner's stock until shortly before the institution of the case at bar. This clearly appears from the opinion in this case by the Attorney General, 37 Op. Atty. Gen. 50.

In the light of the foregoing, therefore, we submit that the petitioner comes plainly within Section 27 of the Merchant Marine Act; and that it was not exempted under the proviso appearing therein.

II

The petitioner urges that if the construction given to Section 27 of the Merchant Marine Act be confirmed, a situation would then be presented wherein it has been deprived of property without due process of law, in violation of the Fifth Amend-

ment to the Constitution; and that being confronted with such a situation, this Court would be called upon to declare that section unconstitutional. This contention was, we submit, properly rejected by the court below:

Section 27 of the Merchant Marine Act of 1920 is a restatement of a policy of long standing on the part of the United States. From the earliest days the United States has endeavored by law to reserve to its own citizens exclusively the coastwise trade of the nation.[1]

The Merchant Marine Act of 1920, as its name imports, was intended to promote the maritime commerce of the United States. Accordingly, the inclusion therein of Section 27, which constituted a more stringent restriction upon aliens engaging in any manner in the coastwise trade, constituted no departure from the old, recognized policy of the United States.

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[1] Chapter 2, Section 5, 1 Stat. 24, 27, gave preference to citizens of the United States by allowing a discount on duties paid for goods imported in such vessels.

Chapter 31, Section 4, 3 Stat. 351, prohibited transportation of merchandise from one port of the United States to another in a vessel belonging wholly or in part to a subject of any foreign power.

Chapter 201, Section 20, 14 Stat. 178, 182, provided for the forfeiture of merchandise shipped from a port of the United States in a foreign vessel to a foreign port and thence reshipped to the United States.

Chapter 117, 27 Stat. 455, forbade shipment in a foreign vessel from one port in the United States to another port in the United States via a foreign port.

The transportation effected by the petitioner would always have been illegal but for the fact that the petitioner was an American corporation. It is, we submit, not beyond the powers of Congress to give statutory recognition to the fact that where the beneficial ownership of the stock of a corporation is in an alien the boats of the corporation are in effect foreign owned. The corporation, as such, may sell its property, or its stock may be sold to persons meetings the requirements of Section 38 of the Merchant Marine Act. The petitioner having these privileges, it is not perceived wherein it can properly invoke the Fifth Amendment to the Constitution.

The regulation in question is no more severe than those prohibiting transportation by a railroad of its own commodities where the property for producing such commodities had been acquired by the railroad when such transportation was still lawful. *Del., Lack. & West. R. R.* v. *United States,* 231 U. S. 363; *Assigned Car Cases,* 274 U. S. 564; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 415; *United States* v. *Lehigh Valley R. R. Co.,* 254 U. S. 255.

We submit that there is no merit to the petitioner's contention that the regulation imposed upon it under the Merchant Marine Act, which regulation expresses a settled policy of the United States, violates any of its rights under the Fifth Amendment to the Constitution.

CONCLUSION

We respectfully submit that the judgment of the court below is correct and should be affirmed.

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NOVEMBER 1934.

APPENDIX

STATUTES

The Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 999, 1008 (U. S. C., Title 46, Secs. 883, 802), provides in part:

> SEC. 27. That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act: *Provided,* That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: *Provided further,* That this section shall not become effective upon the Yukon river until the Alaska Railroad shall be completed and

the Shipping Board shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic.

SEC. 38. That section 2 of the Shipping Act, 1916, is amended to read as follows:

"SEC. 2. (a) That within the meaning of this Act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

"(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

"(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 247.—October Term, 1934.

Central Vermont Transportation Company, Petitioner,
vs.
Harry M. Durning, Collector of Customs at the Port of New York.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 7, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

This suit in equity was brought by petitioner in the district court for southern New York, to restrain respondent, a United States customs officer, from seizing merchandise transported by petitioner's vessels in coastwise traffic, in alleged violation of § 27 of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 999, 46 U. S. C., § 883. An interlocutory order of the district court restraining the seizure and forfeiture of the merchandise thus transported was reversed and set aside by the Court of Appeals for the Second Circuit, on the ground that the transportation was a plain violation of the statute. 71 F. (2d) 273. This Court granted certiorari, — U. S. —, upon a petition which the government, considering the question one of importance, did not oppose.

Petitioner is a Maine corporation, engaged in operating a steamship line on Long Island Sound between New London, Connecticut, and New York City, employing vessels built in the United States and documented under its laws. All of petitioner's shares of stock, with the exception of directors' qualifying shares, are owned and held by the Central Vermont Railway, Inc., a Vermont corporation, which is an interstate rail carrier, with its railroad extending northward from New London to points in Connecticut, Massachusetts and Vermont. The Railway's stock, except directors' qualifying shares, is held in turn by the Canadian National Railway Company, a Canadian corporation. The acquisition of stock of petitioner by the Central Vermont Railway, Inc. and of the latter's stock by the Canadian National Railway Company were

duly approved by the Interstate Commerce Commission. 40 I. C. C. 589; 158 I. C. C. 397, 405, 406.

Petitioner and Central Vermont Railway, Inc., maintain a line for transportation of merchandise by rail and water, by continuous carriage, between points in the New England states and New York City. About two-thirds of the freight passing over the line either originates at points in the northwestern states and is routed over Canadian rail lines and thence over the Central Vermont rail and water line to New York City or passes over the same route in the other direction. These through routes have been recognized by the Interstate Commerce Commission and tariffs for them have been filed with the Commission. The remainder of the traffic originates in New England or New York City and moves between those points. All the freight which moves by petitioner's boats between New London and New York City is therefore transported over the whole or some part of a through route recognized by the Interstate Commerce Commission.

Respondent has seized merchandise which had been shipped over the Central Vermont from St. Albans, Vermont, to New London and carried thence by petitioner's vessel to New York City, and threatens to seize other articles carried by petitioner's vessels upon shipments between points in New England and New York City. Petitioner contends that the threatened seizures, which will work irreparable injury to its business, are unauthorized by § 27 because: (a) not within its prohibition; (b) it does not apply to petitioner or the merchandise which it transports, because of the paramount and therefore exclusive jurisdiction of the Interstate Commerce Commission over the traffic in which petitioner participates; and (c), if applicable to them, it infringes the due process clause of the Fifth Amendment.

1. Section 27 of the Merchant Marine Act prohibits the transportation of merchandise, under penalty of its forfeiture, "by water, or by land and water," between points in the United States "in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, ... Provided, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall

hereafter be filed with said Commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities. . . ."

The vessels of petitioner are not owned by persons who are citizens of the United States within the meaning of the Merchant Marine Act. Section 38, when read with § 37, provides that within the meaning of the Act "no corporation . . . shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, . . . but in the case of a corporation . . . operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum." Subdivision (b) of the section declares: "The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States." Under these provisions the stock of petitioner, owned by a Vermont corporation, whose stock in turn is owned and its voting power vested in a Canadian corporation, is not "owned by persons who are citizens of the United States."

It is said that the merchandise transported by petitioner's vessels is freed from the prohibition of § 27 by the proviso that it shall not apply to merchandise transported over through routes recognized by the Interstate Commerce Commission, where such routes are in part over Canadian rail lines. It is true that all merchandise transported on petitioner's vessels between New London and New York is transported over a part of such through routes as are exempted by the proviso. But the proviso does not speak of transportation merely over a domestic segment of a through route which elsewhere embraces Canadian rail lines. The immunity which it grants is to merchandise transported "over"

the through routes described. Even though the merchandise carried between points in New England and New York City by rail and water line might be said to be transported on a through route which embraces Canadian rail lines, it plainly is not transported over the route.

The construction for which petitioner contends does violence to the words of the statute and would thwart its purpose. The policy declared by the enacting clause, and restated in the first section, of the Merchant Marine Act, is "to provide for the promotion and maintenance of an American merchant marine." The policy has found expression in the enactment of a series of statutes, beginning with the first year of the government, which have imposed restrictions of steadily increasing rigor on the transportation of freight in coastwise traffic by vessels not owned by citizens of the United States.[1] The Act of March 1, 1817, c. 31, 3 Stat. 351, forbade shipment in foreign vessels between ports in the United States. The Act of February 15, 1893, c. 117, 27 Stat. 455, prohibited shipment in foreign vessels from one part of the United States to another via a foreign port, and the Act of February 17, 1898, c. 26, 30 Stat. 248, forbade such shipments "either directly or via a foreign port, or for any part of the voyage." As these restrictions were thought not to include transportation that was partly by water and partly by land, see 30 Opin. A. G. 3, the statute was amended by the addition in § 27 of the Merchant Marine Act of the words "or by land and water." The bill for the amendment as originally introduced did not contain the proviso, which was later added in the conference committee. See Conference Report, H. R. No. 1093, 66th Cong., 2nd Sess., p. 12. The proviso has no other recorded legislative history, but its evident purpose was to avoid disturbance of established routes, recognized by the Interstate Commerce Commission as in the public interest, between the northwestern and eastern states through the lake ports. In these routes foreign owned water carriers participated as well as

[1] See Ch. 2, § 5, Act of July 4, 1789, 1 Stat. 24, 27; Ch. 31, § 4, Act of March 1, 1817, 3 Stat. 351; Ch. 201, § 20, Act of July 18, 1866, 14 Stat. 178, 182; Ch. 213, § 4, Act of March 1, 1873, 17 Stat. 482, 483; cf. Treaty with Great Britain of May 8, 1871, 17 Stat., Treaties, 67, repealed March 3, 1883, 22 Stat. 641; Ch. 117, Act of February 15, 1893, 27 Stat. 455; Ch. 26, Act of February 17, 1898, 30 Stat. 248.

Canadian and American rail lines. See *Application of Grand Trunk Ry. Co. of Canada*, 43 I. C. C. 286; *Rail-Lake-and-Rail Rates via Canada*, 96 I. C. C. 633. The proviso obviously would enable American carriers, participating in such through routes, to retain the benefits of the traffic which in some instances might otherwise be diverted to all water transportation by foreign owned vessels between points in Canada and the United States.

An interpretation of the proviso which would enable foreign owned vessels to carry merchandise in coastwise traffic, over routes wholly within the United States, by the expedient of filing tariffs showing participation in through routes extending over Canadian railways, would go beyond its purpose and in large measure defeat the prohibition of § 27. Both the words of the statute and the unmistakable policy of Congress compel the conclusion that the merchandise respondent has seized and threatens to seize is not within the immunity of the proviso.

2. The argument that § 27 of the Merchant Marine Act does not apply, because petitioner is under the paramount jurisdiction of the Interstate Commerce Commission, is based on the provisions of the Interstate Commerce Act, which provide (§ 1, Par. (1) (a), 41 Stat. 474) that the Act shall apply "to the transportation of passengers or property . . . partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment," and which authorize (§ 6 (13) (b), 37 Stat. 568) the Commission to establish through routes and maximum joint rates over such rail and water lines and to determine the "terms and conditions under which such lines shall be operated in the handling of the traffic embraced." But these and other sections of the Interstate Commerce Act, c. 104, 27 Stat. 379, defining generally the Commission's authority, which by § 1, Par. (1) (a), is extended over such water carriers, are not concerned with the subject matter of § 27 and do not conflict with it. The application of its prohibition in terms to any part of the transportation "by land and water," by a foreign owned vessel, is not to be erased from the statute because the Interstate Commerce Commission was not given authority to enforce it. It is not to be supposed that Congress, by giving jurisdiction to the Interstate Commerce Commission to establish through routes and maximum joint rates for rail and water lines, intended

to remove from them an unrelated prohibition enacted March 1, 1817, 3 Stat. 351, repeatedly reenacted, and specifically made applicable in § 27 of the Merchant Marine Act to the transportation of merchandise by foreign vessels in coastwise traffic "by water or by land and water." We know of no principle of statutory construction which would admit of such a result.

3. Petitioner, in challenging the constitutionality of the statute does not deny the power of Congress to exclude from coastwise traffic vessels which are foreign owned or controlled, regardless of the corporate form which that control may take. But it points to the loss of its business which will ensue if § 27 is applied to it, and to the fact that it established its business with the same corporate relationships which were only later defined so as to bring them within the prohibition reenacted in § 27. § 38 of the Merchant Marine Act, amending § 2 of the Shipping Act of 1916, c. 451, 39 Stat. 728, 729, and made applicable to the Merchant Marine Act by § 37 of the latter Act. It insists that the prohibition of § 27, to which it was subjected by the amendment, deprives it of property without due process of law, in violation of the Fifth Amendment.

This contention is answered by the numerous cases in which this Court has upheld regulations of interstate commerce which have compelled the rail carriers to discontinue parts of their business which had previously been lawful. *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 415, 416; *Delaware, Lackawanna & Western R. R.* v. *United States*, 231 U. S. 363, 369, 370; *Assigned Car Cases*, 274 U. S. 564, 575. There has been no taking of petitioner's property. It established its business under foreign domination, subject to the power of Congress to regulate it, and in the face of a long established national policy to restrict such foreign control of coastwise shipping. The amendment of the statute, so as to include within its prohibition the particular form of foreign control to which petitioner was subject, was no more arbitrary, burdensome or unreasonable than that involved in the statutes prohibiting transportation by a railroad of its own commodities. See *United States* v. *Delaware & Hudson Co.*, *supra*, 415; *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, *supra*, 369, 370.

Affirmed.